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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1759

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ELIASON CORPORATION,
*Petitioner,*

v.

NATIONAL SANITATION FOUNDATION, ET AL.,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Eliason Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 614 F.2d 126. It is shown in the Appendix to this petition as Exhibit A. No opinion of the trial court is reported. The final finding of fact and conclusions of law which is the final opinion of the District Court upon which the

judgment entered is based is set forth in the Appendix as Exhibit B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered February 4, 1980. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. § 1254(1).

## THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a seal of approval program involving a standard publishing organization and its subsidiary testing laboratory both acting as "extra-governmental agencies" and operating in concert with manufacturers and other private groups applying secondary pressure on purchasers to reject noncertified products is a violation of Section 1 of the Sherman Act.

2. Whether a product testing program which is restrictive of competition may go beyond the bounds of legitimate need to accomplish the objectives of a product standard and whether a product testing program must be weighed against a "least restrictive alternative" requirement.

3. Whether the District Court in its finding of fact and conclusions of law erred in failing to properly analyze the record to determine whether there has been a monopolization or attempt or conspiracy to monopolize under Section 2 of the Sherman Act.

4. Whether the action of the defendants was immunized from antitrust liability by reason of the Noerr-Pennington doctrine and whether any restraint flowing from governmental adoption of such require-

ments is beyond a Sherman Act challenge as state action under the doctrine of *Parker* v. *Brown*.

5. Whether an appellate court on reviewing a paper record in which no witnesses testified in open court is bound by the clearly erroneous rule or whether instead the appellate court is free to look at the record de novo.

## STATUTES INVOLVED

The statutes involved in this case are:

1. Section 1 of the Sherman Act, 15 U.S.C. § 1. So far as is pertinent here Section 1 reads as follows:

> Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal...."

2. Section 2 of the Sherman Act, 15 U.S.C. § 2. So far as is pertinent here Section 2 reads as follows:

> Section 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanor...."

3. Section 4 of the Clayton Act, 15 U.S.C. § 15. It reads as follows:

> Section 4. "Any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws may sue therefore in any district court in the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the dam-

ages by him sustained, and the cost of suit, including a reasonable attorneys' fee."

## STATEMENT OF THE CASE

This antitrust case was filed by a private litigant to recover three-fold damages, to obtain injunctive relief, and to obtain its costs and reasonable attorney's fees pursuant to the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2, and 15.

The District Court for the Eastern District of Michigan entered judgment for Respondents, dismissing the action on the merits. In its findings of fact and conclusions of law, the trial court found no violation under sections 1 or 2 of the Sherman Act and also held that "the conduct of some defendants in soliciting and urging other governmental defendants to adopt NSF findings, listings and seal as binding in their jurisdiction is immunized by the *Noerr-Pennington* doctrine." It further ruled that "any restraint flowing from the governmental adoption of such requirements is beyond Sherman Act challenge as state action under the doctrine of *Parker* v. *Brown.*"

The United States Court of Appeals for the Sixth Circuit ruled that the findings of fact adopted by the District Court with respect to the alleged violations of §§ 1 and 2 of the Sherman Act were supported by substantial evidence and were not clearly erroneous. The Sixth Circuit also specifically ruled:

(a) The actions of Respondents were not a *per se* violation of Section 1 of the Sherman Act.

(b) Petitioner had failed to prove that the conduct alleged to constitute a violation of the antitrust laws was both unreasonable and that it restrained competition.

(c) There was no evidence of any abuse of monopoly power or any intent to monopolize in violation of Section 2 of the Sherman Act.

This action was brought by Eliason Corporation (Eliason) against the National Sanitation Foundation, the National Sanitation Foundation Testing Laboratory, six of Eliason's competitors or potential competitors, the National Restaurant Association, numerous health officials as a class (for purposes of injunctive relief), and nine named individuals. The complaint charged that the Respondents have engaged in an unlawful conspiracy, "the necessary result of which has been and is to cause purchasers and users of products which have a relationship or bear on public health and sanitation to refuse to deal with manufacturers of such products which are not approved by NSF, and to refuse to purchase such products which do not carry the seal of approval of NSF."

For years prior to the conception of the National Sanitation Foundation (NSF), the glassware industry felt put upon by public health officials. In 1942 representatives of Respondent Hobart, along with others from the glassware industry, met with officials of the U. S. Public Health Service who suggested that industry establish a non-biased testing facility whose results would be acceptable to all health agencies.

In November, 1944, several manufacturers met in Toledo, Ohio, and agreed to finance a foundation similar to Underwriters Laboratory.

One of the original reasons for establishing the NSF was the existence of conflicting requirements in local health codes concerning sanitation standards. These differences were, however, not radical and could almost

be termed as minor. Manufacturers sought the assistance of NSF in the adoption of standards to avoid the adoption of government standards and to permit manufacturers to help create industry standards.

On November 27, 1944, NSF was incorporated as a nonprofit corporation for the purpose of research, education, and standard development in the field of health and sanitation. The NSF program was modeled after the programs of Underwriters Laboratory and the American Gas Association. In 1945 NSF selected the sponsoring manufacturers to be its industry advisory board.

NSF did not and has not itself engaged in a certification program. However, on November 21, 1952, the National Sanitation Foundation Testing Laboratory (NSFTL) was organized as a subsidiary of NSF to engage in special research projects and to test products to determine if they comply with the appropriate NSF standards. Its articles of incorporation included a policy provision "to encourage the business and industry of those who meet and fulfill the requirements of such sanitation standards. . . ."

NSF claims that it does not write standards but only provides the philosophy, mechanism, working facilities, and secretariat for the representatives of various groups who come together to develop NSF standards. The results are consensus standards based upon committee agreement rather than any scientific input from NSFTL.

The NSF's standard drafting authority is nonofficial but intended by NSF to be available for adoption into law by local, state, or federal governments or agencies. The standards developed by NSF are for

the design, manufacture, installation, and use of health-related equipment.

The NSF has assisted a number of industry associations in establishing national sanitation standards for their products to assure uniformity of equipment among different manufacturers in the same field when this is advantageous.

Industry participation is an essential part in the development of any NSF standard. It is for this reason that prior to the adoption of any NSF standard, an exploratory meeting is held with industry, usually without public-health participation. Funds for standard development are derived from the special interest concerned. As a result, a majority of the NSF standards have been underwritten by those manufacturers and trade groups that are commercially interested in the NSF program. Both NSF and NSFTL have received large sums of money in "fees" from manufacturers needing NSF official listing and NSF's Seal of Approval. Many manufacturers seeking NSFTL approval make substantial cash gifts to NSF.

Currently the initial drafting of an NSF standard is done by a standards task committee made up primarily of industry representatives who have agreed to underwrite the cost. Their function is to make the standard "pr ctical" from the industry's standpoint.

The draft of a proposed standard is the collective effort of the industry participants and must be approved by at least 90% of the committee. A trade association, however, occasionally may draft a complete standard. NSF has nothing to do with the proposed standard at this stage except to put it into the proper form. In fact, NSF may not make any changes,

except editorial, in the proposed standard as it is developed by the task committee. After the task committee completes its work and makes its recommendations, the proposed standard is referred to the NSF joint committee.

The joint committee is an NSF standing committee consisting of individuals representing different health organizations, user groups, and participating manufacturers. The industry members of the joint committee include all industry representatives who have agreed to participate with NSF under a given standard. The joint committee does not adopt standards nor does it have the prerogative of changing the recommendation coming from the industry-dominated committee. If the joint committee does not agree with the proposed standard, its only alternative is to return it to the task committee for review, comment, and clarification. The joint committee also reaches its decisions by consensus.

After the joint committee has completed its work and made its recommendations, the standard goes before the NSF's Council of Public Health Consultants, a permanent committee of NSF. The original members were selected by NSF and thereafter the council has selected its own members. The function of the council is to review the proposed standard only to determine if the proposed standard encompasses the *minimum* health requirements. The council, like the joint committee, is prohibited from making technical changes. It must refer questions to the joint committee, which in turn must refer them to the task committee. There is no real connection between the council and the development of a standard. It cannot initiate standards and is primarily administrative in character.

After the council has approved a standard, it goes to the NSF Board of Trustees for authorization and implementation.

The Board of Trustees' action is pro forma. The board is composed primarily of administrative financial, not technical, personnel so the board does not have the expertise to review standards. In fact, the board has *never* rejected a standard.

The testing laboratory will only evaluate a product after the manufacturer has entered into a contractual agreement with and paid the required fee to NSFTL. It effects compliance with NSF standards in two ways: (1) an official listing of names and addresses of manufacturers with whom it has contracted and who have been found by NSFTL to comply with NSF standards, and (2) the NSF Seal of Approval. NSFTL sends the official "listing" to all state and local health and sanitation officials, trade associations, purchasing agents, architects, and food equipment consultants.

The only way a product may be considered approved by NSFTL is for it to bear the NSF seal. The seal is copyrighted by NSFTL, and only NSFTL, not NSF, can issue it. NSF claims that the purpose of its seal is to identify products that comply with NSF standards and to provide a reference to those who utilize the standards to determine those companies whose products meet NSF standards. NSF acknowledges there may be products that meet NSF standards but do not bear the NSF seal.

Eliason manufactures commercial refrigerators and freezers for sale to food markets but also equally suitable for restaurants and other food-service establishments. For this reason the discovery proceedings and

focus in this case were directed more specifically to NSF Standard No. 7 and a proposed and almost completed Standard for Supermarket Equipment.

NSF Standard No. 7 relates to commercial refrigerators and freezers of the type generally used in the food-service industry. It applies to reach-in refrigerators and frozen-food cabinets; walk-in refrigerators and frozen-food cabinets; under-counter refrigerators and frozen-food cabinets; refrigerated beverage coolers; and open and closed refrigerators. Eliason claims that it has not been able to market its products to food-service establishments, such as restaurants, although its products are suitable for such uses, because of the NSF effected proscription.

The first general meeting at NSF concerning the development of Standard No. 7 was held on March 26, 1958, following several smaller meetings held by NSF with refrigeration-equipment manufacturers and some public-health people. During a closed-door industry session the manufacturers formed a task committee and selected Henry Traulsen of Respondent Traulsen to be chairman. Those present included representatives from Respondents Victory Metal, Elliott-Williams, Traulsen & Co., and Koch Refrigerators. Each manufacturer attempted to gain an advantage over competitors in the standard-drafting process. The president of Respondent Victory Metal informed NSF that the proposed standard was being compiled not for the purpose of sanitation but for the pacification of members of industry. The president of Respondent Koch Rerigerators stated he felt the work of the standard-drafting committee was in itself substandard, the final effect of which would force his company to build cheaper, less satisfactory, products in order to compete

with equipment of low quality that would be dignified by the NSF seal. He resigned from further participation in the preparation of Standard No. 7 because it was being developed in a completely unscientific way.

In 1962 the president of Eliason Corporation received a letter from Respondent McPhee, one of the principle public-health figures active on NSF committees. McPhee, a sanitarian in St. Louis Park, Minnesota, insisted that an Eliason walk-in cooler scheduled to be sold to and installed in a St. Louis Park supermarket meet the requirements of NSF Standard No. 7. Petitioner, at the urging of McPhee, contacted NSF only to learn that Standard No. 7 prohibited the use of rust-proof galvanized steel. NSF showed Eliason a walk-in cooler manufactured by competitor Respondent Elliott-Williams and said Eliason would have to quit using rustproof steel and would also be required to put a coving strip on the ceiling some ten feet in the air as in the Elliott-Williams cooler. NSF arbitrarily refused to consider the Eliason specifications, which Eliason believed to be superior in quality to Standard No. 7 or the competitor's cooler. Eliason indicated its unwillingness to use what it considered to be steel of an inferior quality subject to rust and demanded the return of the previously paid evaluation application fee. As a result, Eliason lost its sale but continued to sell its products in accordance with specifications which it believes to be superior to those required by NSF Standard No. 7.

Although NSF did not agree to permit Eliason to use galvanized steel in its product at this time, in 1963 NSF changed its standard to permit galvanized steel. The other Standard No. 7 requirement to which Eliason specifically objected in 1962—the cove corner in the

ceiling of the walk-in cooler—is considered to be a worthless provision only kept Standard No. 7 to satisfy the competitive advantage of Respondent Elliott-Williams. At a March 4, 1969, strategy meeting of industry participants of Standard No. 7, Respondent Elliott-Williams threatened to vote against the industry group and buck the "united front" if it did not "go along" with the retention of the NSF-required cove corner in walk-in coolers, which everyone at the meeting agreed was without purpose.

In the food-service field it is generally understood that in order to market food-service equipment, the equipment must bear the NSF Seal. (See Exhibit C in the Appendix to this Petition.) In fact Petitioner has been effectively foreclosed from selling its coolers and freezers to food-service establishments. The evidence in this case establishes that all manufacturers selling coolers and freezers to food-service establishments have joined the NSF certification program.

At the time Petitioner initiated this action, NSF was preparing a new Standard for Supermarket Equipment, including refrigeration equipment used in food stores. Starting in 1962 the Commercial Refrigerators Manufacturers Association (CRMA) determined it would establish a liaison with NSF. At the same time CRMA established a subcommittee on standards and specifications and selected the president of Respondent Koch as chairman. Thereafter there has been continuing contact between NSF and CRMA pertaining to either Standard No. 7 or the proposed Standard for Supermarket Equipment.

The majority of the people working on the task committee for the proposed supermarket standard are

industry people, and the draft of the proposed standard represents the thinking of the participants.

Rump strategy meetings and telephone conferences of participating manufacturers of the proposed supermarket standard were held prior to official NSF meetings. These meetings were held to insure that each participant understood the ramifications of each phrase, paragraph, or word being placed in the standard. There also have been exchanges of comments on drafts between participating manufacturers, with Respondent Tyler acting as the clearinghouse. This was so that industry would present a consensus position.

The four major manufacturers of refrigeration equipment for supermarkets—Tyler, Hussman, Hill, and Warren (all competitors of Eliason)—thus are acting in concert to make certain that the proposed standard meets their joint approval. The draft of the proposed standard provides for the industry participants to retain authority in the interpretation of the standard itself.

Contrary to its current protestation, NSF has had a long history of urging that government and the public demand the NSF seal. (See Exhibit D in the Appendix to this Petition.) From the establishment of NSFTL, NSF and NSFTL representatives have urged public-health and sanitation officials to accept for use only those products approved by the NSFTL and bearing the Seal of Approval. The NSF's representative has told public-health officials that since they were extremely busy, if they did not want to take the time to really evaluate the equipment, they could look to the seal to determine that the equipment met basic health requirements.

NSF and NSFTL urged manufacturing groups to use their influence with public officials to accept their standards and the Seal of Approval. It also suggested to trade associations that only NSF-approved equipment be handled by suppliers.

NSFTL also adopted a policy providing that in order for a piece of equipment to be considered NSF approved, it had to bear the NSF seal. The purpose of this was to effect a requirement of NSF certification by local health agencies.

The NSF/NSFTL certification program is nationally accepted and recognized, and the majority of public-health agencies nationwide demand the NSF label on the applicable type of equipment.

The efforts of NSF and NSFTL in persuading health departments to recognize the NSFTL evaluation and certification program forced industry to apply to NSFTL for the evaluation and certification of its products, although NSF and NSFTL realized that there is substantial question as to the legality of requiring the use of the Seal of Approval.

As the Court of Appeals observed, Eliason does not challenge the reasonableness of the standards. Rather, Eliason focuses its attack on the certification program itself. Any manufacturer, whether or not it participates in the formulation of a standard, may submit its equipment to NSFTL for testing. The manufacturer, however, must enter into a contract with the NSFTL and pay certain fees prescribed by NSFTL. The reasonableness of these fees are not here at issue. Eliason does not claim that it has been required to meet a different standard from the one applied to its competition or that it has been barred from participating in any of

the NSF or NFSTL programs. In this case Eliason does not now seek nor desire to have its products tested or certified by NSFTL.

## THE BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

The complaint alleged a violation of the antitrust laws which is actionable in any District Court of the United States at the instance of any party injured in his business or property. The District Court had jurisdiction under Section 4 of the Clayton Act, 15 U.S.C. § 15.

## REASONS WHY THE WRIT SHOULD BE GRANTED

There are three reasons why the Writ of Certiorari should be granted in this case:

FIRST: The decision of the Court of Appeals for the Sixth Circuit conflicts in principle with the decisions of this Court.

SECOND: Certain holdings of the Court of Appeals conflict with those of other Courts of Appeal.

THIRD: The Court of Appeals opinion in this case has decided an important question of federal law which has not been previously addressed or settled by this Court.

## PRELIMINARY STATEMENT

In considering the facts of this case and applying them to the reasons why the Writ should be granted, four points should be kept in mind:

(1) This action was bifurcated for trial. Thus, this phase and the evidence addressed deal only with the question of whether Respondents have violated Sec-

tions 1 and 2 of the Sherman Act. The issues of impact upon Petitioner and damages were reserved for later determination.

(2) The District Court elected to consider the facts on a paper record (deposition transcripts, pleadings, interrogatories, admissions, and exhibits). It did not hear live testimony in open court and had no opportunity to draw inferences from demeanor testimony.

(3) Petitioner does not want to be forced into the NSF/NSFTL "voluntary" certification program, so this case does not involve the question of improper or discriminatory exclusion.

(4) This is not a case where a product standard, as such, is claimed as the alleged violation of the Sherman Act, although Petitioner believes that in some cases, if not all ,the standard itself may be in violation. Rather the target of this action is the NSF Seal of Approval and annual listing publication. Petitioner seeks to prove that the certification program is an unreasonable restraint of trade. The issue as to whether the effect of Respondents' actions is an unreasonable restraint of trade therefore must be applied against the NSF/NSFTL certification program.

## ARGUMENTS

### I.

### THE PRODUCT SEAL OF APPROVAL AND LISTING PUBLICATION PROGRAM HERE QUESTIONED CONSTITUTE AN IMPERMISSIBLE RESTRAINT OF TRADE IN VIOLATION OF SECTION I OF THE SHERMAN ACT.

This case involves private group acting in concert and using secondary pressure which is sufficiently coercive as to legally resemble a refusal to deal.

This Court has held that compelling third parties to do business on terms dictated by combining parties violates the Sherman Act. *Montague & Co.* v. *Lowry,* 193 U.S. 38 (1904); *Loewe* v. *Lawlor,* 208 U.S. 274 (1908); *Binderup* v. *Pathe Exchange,* 263 U.S. 291 (1923); *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939).

In *Eastern States Retail Lumber Dealers' Ass'n.* v. *United States,* 234 U.S. 600 (1914), this Court found that a lumber dealers' association had violated the Sherman Act although the association itself had not refused to deal with anyone, since the circulation of blacklists by the association was evidence of participation by the association in a conspiracy by which its members boycotted wholesalers on the list.

It appears that a blacklist came to be regarded by this Court not merely as evidence of conspiracy but as activity illegal in itself. *Loewe* v. *Lawlor, supra; Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443, 467-68 (1921). Other courts have held that not only blacklists but simple persuasion should be regarded as antitrust violations. *Paramount Pictures, Inc.* v. *United Picture Theatre Owners,* 93 F.2d 714, 719 (3rd Cir. 1937); *Professional & Business Men's Life Ins. Co.* v. *Bankers Life Co.,* 163 F.Supp. 274, 285 (D. Mont. 1958); *Boerstler* v. *American Medical Ass'n.,* 16 F.R. D. 437, 445 (N.D. Ill. 1954); *Council of Defense* v. *International Magazine Co.,* 267 F. 390 (8th Cir. 1920).

In *Fashion Originators' Guild of America* v. *Federal Trade Comm'n,* 312 U.S. 457 (1941), this Court ruled that it was a *per se* violation of Section 1 of the Sherman Act if a combination designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors.

In *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Com.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), the Fifth Circuit held that the touchstone of *per se* illegality has been the purpose and effect of the arrangements in question: "Where exclusionary or coercive conduct has been present, the arrangements have been viewed as 'naked restraints of trade' and have fallen victim to the *per se* rule." Here we have conduct which is coercive in nature.

In this case Respondents have sought (and to a large extent have succeeded) to prevent the sale of products which do not have their approval. Exclusion of manufacturers from the market of those who do not choose to join the "voluntary program" here has been accomplished by the use of the combination's concerted power to make the Seal of Approval a prerequisite to effective competition. The seal determines who is "in" and who is "out" of the food-services equipment field.

The Seal of Approval is no less than a license to compete. All the strength of the combination is directed toward maintaining the effectiveness of that license by preventing the sale of products which do not bear the seal. Professor Handler notes that "it is clear upon reflection that agreements . . . limiting entry are tantamount to . . . the requirement of a license as a prerequisite to doing business." Handler, *Antitrust in Perspective* 23 (1957).

The interest of the public in products that are safe and healthful is universal and certainly not confined to products used in food establishments. Nevertheless, a suggestion that this universal interest should be

served by requiring all new products to be licensed by the present competitors in each industry would be greeted with some surprise. But this is exactly the situation which the manufacturing Respondents and the other manufacturing co-conspirators which participate in the NST/NSFTL program have brought about in their own segment of the economy.

A committee which includes Petitioner's competitors establishes and periodically amends the NSF "consensus" standards and finances the operations of NSF. The NSFTL, a wholly owned subsidiary of NST, then is paid by the manufacturers to "judge" the quality of all products produced by those manufacturing competitors against the NST "consensus standards" which have been created by Petitioner's competitors. A license is then issued only to those who have paid the fee to and have been approved by NSFTL. The Respondents then use their concerted power to prevent the sale of unlicensed products.

Whatever special values this program serves, Respondents' motives are irrelevant because under the Sherman Act competition is the basic instrument of social control. The fact that restraints on the entry of new rivals may also operate in the public interest by promoting social values other than workable and effective competition will not justify them. Handler, *Antitrust in Perspective, id.* at 27.

The NSFTL, by its licensing system, has become, in effect, an extra-governmental agency which "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, 242 (1899).

"Reasonable" price fixing is not allowed because "those who fixed reasonable prices today would perpetrate unreasonable prices tomorrow," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), and "reasonable" restraints on market access are not allowed because the combination which excludes competitors reasonably today could do so unreasonably tomorrow, when they are no longer subject to judicial supervision. *Cf. United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). An economist agrees: "It is impossible to leave private groups free to regulate without leaving them free to exploit." Edwards, *Maintaining Competition* 25 (1949).

The NSFTL testing programs and the varied methods devised by Respondents to make the NSFTL's licensing system effective probably would be illegal if they were only acts of the individual Respondents, but when these acts became part of the sum of acts relied upon to effectuate the NSF/NSFTL plan, they without doubt become the combination in restraint of trade which Section 1 expressly forbids. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809 (1946); *Binderup* v. *Pathe Exchange, supra,* 263 U.S. at 312.

For this reason the NSF/NSFTL plan is significantly different from programs established by truly independent testing laboratories. Such organizations, unlike NSF, do not have an interlocking embrace with manufacturing competitors. They are not married to "consensus standards" developed and paid for by those seeking the license. The independent organizations merely test. They and their officers and agents do not join in conduct designed to exclude non-approved products from the market.

Because the core of the charge in this case is a conspiracy to restrain trade, the Respondents who do not compete directly with Petitioner are not excused from liability. *Klors* v. *Broadway-Hale Stores,* 359 U.S. 207 (1959).

Insofar as Respondents accept voluntary restraints on their own behavior, the restraints may appropriately be tested for reasonableness, as was done in this case by the trial court, and may escape the sanctions of the Sherman Act if the effect on outsiders is sufficiently indirect. But insofar as the restraints directly affect outsiders such as Petitioner and cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment, they are—and should be—illegal *per se.*

If the *per se* rule is not applied in this case, then inquiry into the reasonableness of Respondents' conduct must be made. The concept of reasonableness has consistently been rooted in the overriding policy of the Sherman Act to preserve and enrich competition by striking down all restraints which are actually or potentially anticompetitive in purpose and effect. Handler, *Antitrust in Perspective, supra,* at 27; *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594 (1953).

Accordingly, "reasonableness" is not given a broad, generic meaning when used in the rule of reason. The term relates only to how much effect the restraint has on competition. It does not relate to the reason why the restraint was imposed.

This limited meaning of "reasonableness" excludes from consideration the motives impelling the restraint. Respondents cannot be heard to say that their re-

straint is reasonable because providing consumers with better health- and sanitation-related products is good for the public and thus permitted as a good or reasonable motive. *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30 (1930); *Lee Line Steamers* v. *Memphis, H&R Packet Co.,* 277 F. 5 (6th Cir., 1922).

The effect on competition of Respondents' conduct must be evaluated in light of the principle that when a combination of competitors (and those that aid and abet them) denies its rivals the opportunity to enter or stay in the market, its effect is to eliminate competition. The restraint imposed by Respondents does not merely have an anticompetitive tendency to be weighed against other factors. Respondents have sought, acquired, and utilized the power to prevent Petitioner and others from entering the food-service field and have interferred with their trade in the food-market field. It follows that Respondents' conduct constitutes an unreasonable restraint of trade and thereby violates the Sherman Act.

This Court in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 687 (1978), recently considered the question of whether a professional society's canons of ethics prohibiting competitive bidding among its members could be sustained under the rule of reason on the ground that the ban was a "reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding." More particularly, the Defendant in that case urged that the restraint was justified "because bidding on engineering services is inherently imprecise, would lead to deceptively low bids and would thereby tempt individual engineers to do inferior work

with consequent risk to public safety and health." *Id.* at 693. This Court held that argument to be legally insufficient, tracing the contours of the rule of reason from its common law genesis to the case of *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). This Court held that the inquiry under the rule "is confined to a consideration of [the] impact [of the restraint] on competitive conditions," 435 U.S. at 690, that is, to "whether the challenged agreement is one that promotes that competition or is one that suppresses competition." *Id.* at 691.

Put another way, once a restraint is found to have an anticompetitive effect, it violates the rule of reason unless that effect is outweighed by some pro-competitive impact.

In *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), the court held that the only permissible injury was whether the national football league's college draft did more to promote competition than to suppress it. The court concluded that the draft as it existed in 1968 was an unreasonable restraint of trade.

In *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), this Court said:

> [T]he true test of legality is whether the restraint imposed is such as *merely regulates* and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question *the court must ordinarily consider* the facts peculiar to the business in which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and *its effect*, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all rele-

> vant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and predicate consequences. (Emphasis supplied.)

In this case the District Court made 63 findings of fact, but nowhere in those findings is it indicated that the court had sufficiently plumbed the questions as to: (1) the condition of the affected industry before and after the *restraint* was imposed; (2) the nature of the *restraint* (Seal of Approval and the listing publication), although giving great attention to the non-issue of the case, the reasonableness of NSF Standards; (3) the effect, actual or probable, of such *restraint*; (4) the history of the *restraint*; and (5) the reason for adopting the particular remedy here under attack (the NSFTL certification and listing program).

What is apparent from the District Court's findings of fact and conclusions of law is that it rested its decision almost totally upon what it believed to be the purpose of the foundation's standard program, which was not the subject of Petitioner's attack. The court stated that it believed that the program was "procompetitive." The court, however, almost completely ignored the testing laboratory's (NSFTL) certification and listing program, which was the target of this lawsuit. In addition, and more importantly, the court failed to give any attention in its findings of fact to the restraint itself.

Since the trial court failed to apply the teachings of this Court *Board of Trade,* making, literally, no analysis of the specific restraint complained of in this action, it is apparent that the court was not in a position to

apply the balancing test required by this Court in *Professional Engineers*. The District Court thus failed to give consideration to the question of whether the anti-competitive effect of the restraint zeroed in upon by Petitioner was outweighed by some pro-competitive impact. The District Court seemed only to be concerned about finding some general pro-competitive purpose in the NSF standards program.

The Court of Appeals likewise appears to have failed to apply the balancing test announced in *Professional Engineers*. Of course it would have been difficult for the Court of Appeals to apply that test because the District Court had failed to make an analysis in its findings of fact that would permit an appellate court to determine whether the trial court had, in fact, applied the test. The Court of Appeals also foreclosed such independent evaluation on its part by giving carte blanche acceptance to the District Court's findings of fact.

It seems clear that neither the District Court nor the Court of Appeals applied the principles announced in *Board of Trade* or the test required by *Professional Engineers*. Thus the holding of the Court of Appeals is in conflict with those principles.

The holding of the Court of Appeals concerning the pro-competitive basis for the certification program is also suspect. Even if it were true that standards were needed to promote uniform requirements among public-health authorities as a means of minimizing differing, conflicting requirements, the Petitioner has not by this action sought relief against the development of standards for health-related equipment. The findings of the District Court as to pro-competitive conduct only went

to the alleged need for uniform standards among public health jurisdictions. Those findings certainly did not find a pro-competitive purpose in substituting the evaluation process of a private testing laboratory for a statutorily imposed non-delegable product evaluation by a local, regional, or state health agency acting as a quasi-adjudicative arm of government. Historically the boycott may be symptomatic of dangerous power in the hands of a combination that has made itself an "extra-governmental agency." *Fashion Originators' Guild, supra,* 312 U.S. at 465; *American Medical Ass'n* v. *United States,* 130 F.2d 233, 249 (D.C. Cir. 1942); *FTC* v. *Wallace,* 75 F.2d 733, 737 (8th Cir. 1935); *United States* v. *New Orleans Ins. Exch.,* 148 F.Supp. 915, 920 (E.D. La. 1957).

As mentioned above, the NSF/NSFTL certification program is patterned after those operated by Underwriters Laboratories and the American Gas Association (AGA). This Court has never ruled on the validity of seals of approval. In *Radiant Burners* v *Peoples Gas Co.,* 364 U.S. 656 (1961), the Court only considered the question of whether the refusal to furnish gas to customers was itself illegal under the antitrust laws. This Court did not at that time find it necessary to rule on the AGA certification program. Petitioner now asks this Court to take the next logical step and review a certification program which Petitioner claims violates the Sherman Act by a combination exerting sufficient secondary pressure on the market place as to resemble a refusal to deal.

The record establishes that with reference to products covered by NSF Standard No. 7, local health departments were fully able to evaluate products. Re-

spondent Tom S. Gable, executive director of NSF and NSFTL and the director of standards development and implementation of NSF, testified that a sanitarian is competent to evaluate equipment against the NSF standard right in the field because there is no performance requisite involved. The District Court also failed to make any findings as to the proposed supermarket standard. Petitioner is left to guess as to why the certification program is needed at this time for that food industry. There has been no showing as to any pro-competitive purpose in that area. The purpose of that new program of NSF is suspect.

## II.

**EVEN IF A PRODUCT-STANDARDS PROGRAM SHOULD BE DETERMINED TO SERVE A LEGITIMATE NEED, THE USE OF A PRODUCT-TESTING PROGRAM WHICH IS RESTRICTIVE OF COMPETITION MUST NOT GO BEYOND THE BOUNDS OF LEGITIMATE NEED TO ACCOMPLISH THE OBJECTIVES THAT THE STANDARDS MAY LAWFULLY SERVE.**

Petitioner further contends that the use of the seal and listing publications is an unreasonable restraint of trade under the "rule of reason" test because it is more restrictive of competition than is necessary to accomplish whatever legitimate objective may be cited for the use of the seal and listing publications. Unfortunately, the lower court made no finding on this important issue. Mr. Justice Brennen, in his concurring opinion in *White Motor Company* v. *United States,* 372 U.S. 253, 270 (1963), indicated that the question is not one only of justification which the lower court sought to address, but is one also of determining whether the claimed restraint is "more restrictive than necessary, or excessively anticompetitive."

The Court of Appeals did not in its opinion consider this "least restrictive alternative" test. The Court of Appeals failed to discuss this question although it was specifically raised in the District Court and the Court of Appeals.

Petitioner acknowledges that there is a split of authority as to whether the "least restrictive alternative" test must be applied. The Ninth Circuit in *Siegal* v. *Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), stated that "[r]estraint of trade can be justified only in the absence of less restrictive alternatives." The Fifth Circuit in *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 942-43 (5th Cir. 1975), also utilized the "least restrictive alternative" test.

On the other hand, the Third Circuit in *American Motors Inn, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3rd Cir. 1975), refused to apply this test but held that "the issue is whether the restriction actually implemented is 'fairly necessary' in the circumstances of the particular case, or whether the restriction 'exceed[s] the outer limits of restraint reasonable necessary to protect the defendant.' "

This split in the circuits suggests that it is appropriate for this Court to determine whether the "least restrictive alternative" test should be applied in "rule of reason" cases. It is submitted, however, that the seal and listing publication of NSFTL exceed the outer limits of restraint reasonably necessary to protect Respondents. The Respondents have their standards. They are thus protected against the existence of varying local health codes. Respondents are not entitled to any special treatment by a local health agency

by contracting with a private testing laboratory, particularly in light of the fact that the effect of such a restraint has been to exclude from the market in the food-service field all who do not choose to buy the seal. The restraint here involved thus even violates the teachings of *American Motors Inn, Inc., id.*

It is submitted that the proofs in this case at the very least establish the use of the Seal of Approval and the listing publication by the NSFTL and the joint action involving the Respondents and co-conspirators is more restrictive of competition than is necessary to accomplish whatever legitimate objective may be cited for it.

The intent of NSF and its program is to provide a manufacturer with a seal so the manufacturer will have an easier time marketing its product. Even if the various NSF standards should be determined to serve a legitimate need, the use of the Seal of Approval and the listing publication, which are restrictive of competition, go beyond the bounds of legitimate need to accomplish the objective that the standards may lawfully serve.[1]

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[1] Former Assistant Attorney General Donald F. Turner, in an address prepared for delivery before the Antitrust Law Section of the New York Bar Association on January 26, 1967, expressed concern about the unreasonable exclusion of competitors and/or unwarranted elimination of product options caused by a standard or seal of approval. He stated:

> "The dangers I have described—unreasonable exclusion of competitors and/or unwarranted elimination of product options—would also be minimized by adopting, instead of a single standard or single seal of approval, a grading scheme based upon general acceptable testing standards. In *Radiant Burners,* for example, the AGA could simply have made testing reports on safety, efficiency and durability of the various

The Federal Trade Commission in an advisory opinion [2] stated that a certification program must not be used to lessen competition, must not have the effect of excluding competitors, must be operated by a laboratory independent from those immediately affected by such a program, should avoid the use of a single standard pass/fail determination, and should employ a graded system preserving consumer and user options.

It is apparent that the certification program here involved fails to meet both the "least restrictive alternative" test and the "outer limit of restraint" test.

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products submitted to us. This would have given consumers a large amount of highly useful information, but would leave them free—insofor as the local distribution utilities did not interfere—to assign their own weights to price and performance characteristics. Moreover, if AGA had confined its activities to the publication of testing reports, this would have forced local governments who wish to establish some control over gas appliances to make for themselves an appropriate legislative determination of what minimum performance standards should be met."

The above approach suggested by Turner relative to product testing approval would be less restrictive of competition and yet adequate to accomplish whatever legitimate objectives the NSF standards might stand to serve.

[2] Advisory Opinion Digest No. 457, American Standards Institute (March 8, 1971), 78 F.P.C. 1628, 1629-30 (1971). (See Exhibit E in the Appendix to this Petition).

## III.

**THE FINDINGS OF FACT OF THE DISTRICT COURT FAILED TO ANALYZE THOSE FACTS NECESSARY TO MAKE A DETERMINATION AND A CONCLUSION OF LAW AS TO WHETHER THERE HAS BEEN THE OFFENSE OF MONOPOLIZATION OR ATTEMPT OR CONSPIRACY TO MONOPOLIZE UNDER SECTION 2 OF THE SHERMAN ACT.**

It does not appear that the District Court analyzed Petitioner's claim under Section 2 of the Sherman Act. As the Court of Appeals noted, the District Court found that Eliason did not set forth facts sufficient to prove the product and geographical markets in which the Respondents were claimed to have monopoly power. The Court of Appeals noted that resolution of this issue was made difficult because of the reservation of injury to Petitioner for future determination, as proof of injury helps to define the relevant market, product, and geographic markets in which Petitioner's products compete. The Court of Appeals, however, correctly noted that Petitioner had conceded that it must prove monopoly power in a nationwide market for all products covered by Standard No. 7. It seems clear that the District Court did not make a determination as to whether there was any monopolization, conspiracy, or attempt to monopolize the market on a national basis. The Court of Appeals, however, concluded that "the benevolent powers possessed by NSF and NSFTL are due to their non-partisan performance and the high reputation enjoyed by them and their individual members in the field of public health and sanitation including the objectivity of the test results." *Eliason Corp.* v. *National Sanitation Foundation,* 614 F.2d 126, 131 (6th Cir. 1980). This conclusion is not supported by the record and should be determined to

be clearly erroneous, particularly in light of the fact that as late as 1974 NSF and NSFTL were engaged in a program to insure that all public-health agencies required use of equipment bearing the NSF Seal of Approval.

## IV.

### THE ACTION OF THE RESPONDENTS IS IN NO WAY IMMUNIZED FROM ANTI-TRUST LIABILITY BY REASON OF THE NOERR-PENNINGTON DOCTRINE AND THE RESTRAINT FLOWING FROM GOVERNMENTAL ADOPTION OF THE NSFTL CERTIFICATION PROGRAM IS NOT BEYOND SHERMAN ACT CHALLENGE AS STATE ACTION UNDER THE DOCTRINE OF PARKER v. BROWN.

In one of its conclusions of law, the District Court specifically ruled that the conduct of some Respondents in soliciting and urging other governmental defendants to adopt NSF findings, listings, and seal as binding in their jurisdiction was immunized by the Noerr-Pennington doctrine and that any restraint flowing from the governmental adoption of such requirements is beyond a Sherman Act challenge as state action under the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943).

The Court of Appeals, in its opinion, however, held that "[i]n light of our disposition of the case, we need not address the applicability of the *Parker* v. *Brown* and *Noerr-Pennington* immunity defenses in this case." *Eliason, supra,* 614 F.2d at 130 n.7. Because the Court of Appeals did not rule, no argument will be made in this Petition, but Petitioner wishes to reserve this point so that it may be raised and argued if certiorari is granted.

## V.

**THE HOLDING OF THE COURT OF APPEALS AND PRIOR RULINGS OF THAT CIRCUIT TO THE EFFECT THAT WHERE A PAPER RECORD IS INVOLVED THE STANDARD OF REVIEW IS STILL WHETHER THE FINDINGS OF FACT OF THE DISTRICT COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE CLEARLY ERRONEOUS IS IN CONFLICT WITH THE HOLDINGS OF OTHER CIRCUITS AND IS INCORRECT.**

The Court of Appeals noted that Eliason contended that because the case was decided on a paper record and because no witness testified in open court, the Court of Appeals should undertake a determination de novo of the facts from the record. *Eliason, supra,* 614 F.2d at 127-28 n.1. The court was, however, erroneous in stating that the Sixth Circuit has consistently held to the contrary on that point. *See In re Clemens,* 472 F.2d 939 (6th Cir. 1972). Other circuits have held to the contrary and have not felt bound by the trial court's findings of fact on a paper record. *Carter Oil Co.* v. *McQuigg,* 112 F.2d 275 (7th Cir. 1940); *Equitable Life Assur. Soc.* v. *Irelan,* 123 F.2d 462 (9th Cir. 1941); *Fleming* v. *Palmer,* 123 F.2d 749 (1st Cir. 1941), *cert. denied sub nom. Caribbean Embroidery Cooperative* v. *Fleming,* 316 U.S. 662 (1942); *Bannister* v. *Solomon,* 126 F.2d 740 (2nd Cir. 1942); *LaSalle Street Press, Inc.* v. *McCormick & Henderson, Inc.,* 445 F.2d 84 (7th Cir. 1971).

When only a paper record is involved, the clearly erroneous rule should not apply, and the court is free to look at the record de novo. *United States* v. *General Motors Corp.,* 121 F.2d 376 (7th Cir. 1941), *cert. denied,* 314 U.S. 618 (1941).

## CONCLUSION

If the antitrust laws have any purpose in our nation, they should protect the small independent businessman who does not choose to walk in the embrace of his fellow competitors. These laws must protect one who seeks to sell his product and compete with others free from such artificial barriers as a seal of approval.

The small manufacturer should not, under our laws, be penalized because he refuses to join a combination or conspiracy which he believes to be a restraint of trade and detrimental to product innovation.

A restraint on trade must always be deemed suspect by those creating or enforcing such manmade roadblocks to competition. Only the most compelling interests should ever permit a device such as a seal of approval issued by a private organization exercising extra-governmental powers to deny full and free access to this Country's marketplace.

For the reasons stated above, this Court should grant a Writ of Certiorari in this case.

Respectfully submitted,

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# EXHIBIT

**EXHIBIT A**

**Opinion of U.S.C.A.—6th Circuit**

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

No. 77-1590

ELIASON CORPORATION, *Plaintiff-Appellant,*

v.

NATIONAL SANITATION FOUNDATION et al.,
*Defendants-Appellees.*

Argued October 1, 1979

Decided February 4, 1980

Manufacturer brought antitrust action against national testing laboratory and others charging that they engaged in unlawful conspiracy to cause purchasers and users of products to refuse to purchase products not carrying seal of approval of laboratory. The United States District Court for Eastern District of Michigan, Charles W. Joiner, J., —— F.Supp. ——, entered judgment for laboratory, and appeal was taken. The Court of Appeals, Weick, Circuit Judge, held that: (1) no unreasonable restraint of trade resulted from establishment and promotion of independent testing laboratory's seal of approval and listing programs for products even though such tended to exclude nonapproved products from the market, and (2) independent testing laboratory did not exercise monopoly power to exclude manufacturers from relevant market through establishment and promotion of seal of approval and listing programs.

Affirmed.

Lee Boothby, Berrien Springs, Mich., for plaintiff-appellant.

Nathan B. Goodnow, Robert G. Cutler, Dykema, Gossett, Spencer, Goodnow & Trigg, Eugene D. Kirkby, Detroit, Mich., Thomas C. Clarke, Buchanan, Mich., and MacDonald Flinn, White & Case, New York City, John F. McClatchey, Thomas J. Collin, Cleveland, Ohio, and Richard B. Gushee, Miller, Canfield, Paddock & Stone, Detroit, Mich., Leslie W. Jacobs, Isidore Friedman, and Frederick W. Scholem, New York City, Theodore Souris, Bodman, Langley, Bogle & Dahling, Detroit, Mich., for defendants-appellees.

Before EDWARDS, Chief Judge, WEICK and LIVELY, Circuit Judges.

WEICK, Circuit Judge.

The plaintiff-appellant, Eliason Corporation (Eliason), brought this antitrust action in the District Court for the Eastern District of Michigan against the National Sanitation Foundation (NSF), the National Sanitation Foundation Testing Laboratory (NSFTL), six of its competitors or potential competitors, the National Restaurant Association, numerous health officials as a class (for purposes of injunctive relief), and nine named individuals. The complaint charged that the defendants have engaged in an unlawful conspiracy "the necessary result of which has been and is to cause purchasers and users of products which have a relation to or bear on public health and sanitation to refuse to deal with manufacturers of such products who are not approved by NSF, and to refuse to purchase such products which do not carry the seal of approval of NSF." The plaintiff asserted that this alleged conduct amounted to a group boycott of all manufacturers including plaintiff not approved by NSF in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2). The plaintiff prayed for treble damages and injunctive relief.

The parties participated in extensive discovery over a period of four years and developed a massive record con-

sisting of depositions of 26 witnesses and thousands of pages of exhibits. In order to expedite and facilitate consideration of the case, the parties modified normal trial procedures. It was agreed that the trial would be bifurcated and that the court would first consider the issue of whether the defendants violated §§ 1 and 2 of the Sherman Act, "reserving the future determination, if need be, the issues of the impact upon plaintiff of any such violation and the damages, if any, suffered thereby by plaintiff." The agreement also specified that the plaintiff would be given an opportunity to make an oral summation of the evidence to the court. However, due to a misunderstanding, the District Court adopted Findings of Fact, and Conclusions of Law and entered judgment for the defendants before the oral summation was made. These findings were almost identical with the defendant's proposed findings. The plaintiff filed a motion for reconsideration based on the fact that it was not afforded the opportunity to make an oral argument. The court granted the motion and suggested that the first set of findings and conclusions be treated as preliminary. After three days of oral argument to the court, District Judge Joiner adopted Final Findings of Fact, Conclusions of Law and entered judgment for the defendants. These findings had modified in some respects the earlier findings. Because of the importance of the facts to the issues in this appeal we have given careful consideration to the lengthy record.[1]

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[1] Eliason contends that because the case was decided on a paper record involving no opportunity for credibility assessments by the District Court because no witness testified in open court we should undertake a determination *de novo* of the facts from the record. This would invade the province of the trial court. This Circuit has consistently held that, even where a paper record is involved, the standard of review is whether the findings of fact of the District Court are supported by the substantial evidence and are not clearly erroneous. Application of this standard preserves the proper relationship between trial and appellate courts. *Ingram Corp. v. Ohio River Co.*, 505 F.2d 1364 (6th Cir. 1974);

I

The National Sanitation Foundation was founded as a nonprofit organization in 1944 for the purposes of research, education, and standard development in the field of health and sanitation. The NSF program was modelled and developed after the standard and certification programs of the Underwriters Laboratories (UL) and the American Gas Association (AGA). Although NSF has promulgated more than 40 standards covering a wide variety of products, only one standard, Standard 7, and one proposed standard are relevant to this case.[2] The NSFTL was organized in 1952 as a subsidiary of NSF to engage in special research projects and to test products to determine if they comply with the appropriate NSF standards. NSFTL issues a seal of approval to complying products. NSFTL also compiles and distributes lists of complying products to public health officials, architects, food service consultants, and product purchasers. Eliason does not challenge the reasonableness of the standards either in content or application, rather it focuses its attack on the testing programs.

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*Lambros v. Commissioner*, 459 F.2d 69, 72 n.2 (6th Cir. 1972); *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 437 F.2d 244, 246 (6th Cir.), *cert. den.*, 404 U.S. 885, 92 S.Ct. 203, 30 L.Ed. 2d 169 (1971); *U. S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. den.*, 398 U.S. 958, 90 S.Ct. 2162, 26 L.Ed.2d 542 (1970).

[2] Standard 7 does not directly apply to products currently manufactured by Eliason, but it does apply to products in the market from which the plaintiff claims to have been excluded. The proposed standard would directly apply to products manufactured by Eliason. Eliason claims that Standard 7 has occasionally and erroneously been applied to its products by certain health officials. While this may be true, there is no evidence that any of the defendants are responsible therefor. In fact NSF went out of its way to clarify the proper scope of Standard 7. Tyler dep. at 17-18. way to clarify the proper scope of Standard 7. Tyler dep. at 17-18; Gable dep. at 139-40, 201-02, 324-29; Hilbert dep. at 97-99).

Any manufacturer, whether or not it participated in the formulation of the standard, may submit its equipment to NSFTL for testing. The manufacturer must enter into a contract with the NSFTL and pay certain fees which are not claimed to be unreasonable. The products must undergo annual re-inspection in order to retain approved status. Compliance is strictly enforced by NSFTL. Immediately upon receipt of a complaint that a product bearing the seal does not meet NSF standards, NSFTL investigates the complaint. If the product does not comply with the standard, the manufacturer must either bring the product into compliance or remove the seal.

Eliason manufacturers walk-in refrigerators and freezers for sale to food markets. Shortly after Standard 7 was promulgated, Eliason submitted an application to NSFTL to have a walk-in unit tested. Eliason was informed at a very early stage that its equipment did not comply with the Standard without some design modifications.[3] Eliason was permitted to withdraw its application and its money was refunded. There is no evidence that NSFTL is controlled by the plaintiff's competitors or that Eliason was required to meet a different standard than the one applied to its competitors. Nor has Eliason ever been barred from participating in any of the NSF or NSFTL programs.

II

Eliason contends that the acts of the defendants in establishing and promoting the seal of approval and listing programs of the NSFTL constitute a group boycott of all products not tested by NSFTL and urges the appli-

[3] All or nearly all of the manufacturers participating in the program had to make design changes in order to comply with the NSF standard in issue. Eliason failed to comply with the requirement that corners be coved and non-galvanized steel be used. There are substantial health justifications for incorporating these requirements.

cation of a *per se* rule. While the increasing use of and demand for NSFTL approval of products makes marketing of non-approved equipment more difficult, this alone does not prove a *per se* violation of § 1 of the Shermant Act. Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors,[4] or that the conduct as a whole was manifestly anticompetitive and unreasonable.[5] There is no evidence of discrimination or exclusion in this case.

In *Roofire Alarm Company v. Royal Indemnity Company*, 202 F.Supp. 166, 169 (E.D.Tenn.1962), District Court Judge Frank W. Wilson was faced with an antitrust challenge to the Underwriters Laboratory (UL) standard-making and testing program. In applying the applicable rule of reason standard, the court said:

> The action of Underwriters Laboratories, Inc., appears to be for lawful and proper purposes. Even if

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[4] *See, Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Silver v. New York Stock Exchange*, 373 U.S. 341, 348-49, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); and *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee et al.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. den.*, 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973).

[5] *Roofire Alarm Company v. Royal Indemnity Company*, 202 F. Supp. 166 (E.D.Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir. 1963), *cert. den.*, 373 U.S. 949, 83 S.Ct. 1678, 10 L.Ed.2d 704 (1963); *Bridge Corp. of America v. American Contract Bridge League, Inc. et al.*, 428 F.2d 1365 (9th Cir. 1970); *Worthen Bank and Trust Co. v. National Bankamericard Inc.*, 485 F.2d 119 (8th Cir. 1973); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977); *Smith v. Pro Football, Inc.*, 193 U.S.App.D.C. 19, 23-28, 593 F.2d 1173, 1177-82 (D.C. Cir. 1978); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979). *See also, Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

> the defendant participates with or through others in the setting of the standards adopted by Underwriters Laboratories, Inc., there is nothing to indicate that this has accomplished any unlawful or improper purpose. Rather, the defendant's connection with Underwriters Laboratories, Inc., and with other related organizations likewise appears to be for lawful and proper purposes. . . . An association formed to foster high standards, to mitigate evils in trade existing through lack of knowledge or information, and to encourage fair competitive opportunities is not to be condemned as an undue restraint of interstate commerce in violation of the Sherman Act merely because it may effect a change in market conditions, 36 Am.Jur. Monopolies, Sec. 148. The Act sets such standards of reasonableness, and a restraint is not unlawful unless it is unreasonable. (202 F.Supp. at 169).

A panel of this court consisting of Lester Cecil, Chief Judge, Shackelford Miller, Jr., and Clifford O'Sullivan, Circuit Judges affirmed the judgment of the District Court by order "for the reasons set forth in the opinion of the trial judge." 313 F.2d 635 (6th Cir. 1963), *cert. den.*, 373 U.S. 949, 83 S.Ct. 1678, 10 L.Ed.2d 704 (1963).

The burden was upon the plaintiff to prove that the conduct alleged to constitute a violation of the antitrust laws was both unreasonable and restrained competition. The plaintiff's proof in this case failed on both counts. The District Court expressly found that NSF standards were developed to promote uniformity in the health requirements that products are required to meet in different jurisdictions. This uniformity helps promote nationwide competition and enables manufacturers who elect to comply with NSF standards to be reasonably sure that they will not have to modify their product in order to meet the different requirements of many jurisdictions. Eliason con-

tends, however, that even if the standards themselves are reasonable and procompetitive that the testing service offered by NSFTL together with the seal of approval and listing programs are *per se* anticompetitive and unreasonable because they tend to exclude nonapproved products from the market. We disagree. We are of the opinion that the testing services and the seal of approval and listing programs cannot so easily be separated from the standards they are designed to supplement and enforce. *Underwriters Laboratories v. United Laboratories*, 203 U.S.P.Q. 180, 183 (N.D.Ill.1978). Many states do not have adequate facilities to properly test whether or not a product complies with NSF health and safety standards. NSFTL's testing program helps to promote uniformity in the interpretation and application of the standards. The fixation of a seal of approval on the product or the listing of the product in a widely distributed publication only further assures the pro-competitive goal of nationwide acceptance of the product. These are all legitimate means of promoting NSFTL's testing service.[6]

Other factors to be considered in analyzing the reasonableness of standard-making and testing programs lead us to the same result. The practice of treating NSFTL approval of a product as *prima facie* evidence of compliance with local standards avoids waste of time and money for duplicative testing in many different jurisdictions. NSF standards are periodically revised so that no product of adequate sanitary quality is excluded from qualifying for the seal of approval. NSF and NSFTL have never disparaged the quality of products which they have not tested. NSF and NSFTL are independent organizations and are not dominated or controlled by manufacturers of

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[6] We do not intend to foreclose the possibility that some standards may be so unreasonable in content that their net effect injures competition even though some policies of uniformity are served. This is not the case here.

any one product. They are not in direct competition with the plaintiff and have no intent to exclude plaintiff from competition. We agree with the District Court's holding that no unreasonable restraint of trade was shown by the evidence.[7]

## III

Eliason also claims that the defendants violated § 2 of the Sherman Act by exerting collective monopoly power to exclude it from the nationwide market in products governed by Standard 7. The District Court found that Eliason had not set forth facts sufficient to prove the product and geographical markets in which the defendants were claimed to have monopoly power. Resolution of this issue is made more difficult by the reservation of the issue of injury to the plaintiff for future determination if necessary as proof of injury helps to define the relevant product and geographical markets in which the plaintiff's product competes. It is certainly true that the plaintiff must be held to a higher degree of proof where it is attempting to prove a very restricted product or geographical markets. Here the plaintiff has conceded that it must prove monopoly power in a nationwide market for all products covered by Standard 7.

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[7] *See also, Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F.Supp. 154 (D.Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. den.*, 393 U.S. 1024, 89 S.Ct. 636, 21 L.Ed.2d 569 (1969); and *United States v. Johns-Manville Corp.*, CCH 1967 Trade Cases, para. 72, 184 (E.D.Pa. 1967).

In light of our disposition of this case, we need not address the applicability of the *Parker v. Brown* and *Noerr-Pennington* immunity defenses in this case. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

We are unable to find any violation of § 2 of the Sherman Act. We are convinced NSF and NSFTL have not exercised monopoly power to exclude manufacturers from any relevant market; that the benevolent powers possessed by NSF and NSFTL are due to their non-partisan performance and the high reputation enjoyed by them and their individual members in the field of public health and sanitation including the objectivity of the test results.[8] We can find no evidence that there has been any abuse of this monopoly power or even any intent to monopolize.

In our opinion, the findings of fact adopted by the District Court in respect to the alleged violations of §§ 1 and 2 of the Sherman Act are supported by substantial evidence and are not clearly erroneous.

The judgment of the District Court is affirmed for the additional reasons set forth in its findings of fact and conclusions of law.

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[8] Even a monopolist which achieves that status because of a superior product, business acumen, or historical accident cannot be faulted. *Byars v. Bluff City News Co.*, Sixth Circuit slip opinion filed October 16, 1979 (Case No. 77-1227); *United States v. Grinnell Corporation*, 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

**EXHIBIT B**

**The Final Findings of Fact and Conclusions of Law of the District Court**

Entry date: June 3, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 36353

ELIASON CORPORATION, *Plaintiff*,

v.

NATIONAL SANITATION FOUNDATION, et al., *Defendants*.

## FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Procedural Background

This action was filed on April 14, 1971 against six corporations for profit, three corporations not for profit, and nine individuals. Plaintiff, Eliason Corporation, is a Michigan corporation which manufacturers and sells in interstate commerce walk-in coolers and freezers and related racks and accessories. Most of its sales have been to food stores (e.g., National Tea and A&P).

The complaint alleges that defendants have engaged in a conspiracy to cause purchasers of products "which have a relation to or bear on public health and sanitation to refuse to deal with manufacturers of such products who are not approved by NSF, and to refuse to purchase such products which do not carry the seal of approval of NSF," the "essence" of that conspiracy being "to force a boycott" of products not approved by NSF.

The National Sanitation Foundation is a Michigan nonprofit corporation, chartered in 1944. The National Sanitation Foundation Testing Laboratory was chartered as a

Michigan profit corporation on December 4, 1952; on May 11, 1961, its status was changed to that of a non-profit corporation.

Clark Equipment Company is a Delaware corporation, with its principal office located in the City of Buchanan, State of Michigan. In 1963, Clark acquired Tyler Corporation, and the Tyler Refrigeration Division of Clark is engaged in Niles, Michigan, in the manufacture and marketing of refrigerators and coolers in the State of Michigan and other states.

Hobart Corporation (formely called "The Hobart Manufacturing Company") is an Ohio corporation which is registered to do business in the State of Michigan and has a registered office in the State of Michigan. Hobart has been engaged in the business of manufacturing and selling dishwashers, food machines, and scales for many years, has never manufactured or sold any type of refrigeration equipment, or any other products in competition with those of plaintiff.

Defendant (Ohio) Koch was formed as a corporation under the laws of the State of Ohio on March 26, 1969, and from that date to the present has been a wholly-owned subsidiary of defendant Hobart.

Defendant (Ohio) Koch entered an Agreement dated March 31, 1969, relating to the purchase of certain assets and the assumption of certain liabilities of a Missouri corporation, Koch Refrigerators, Inc. (Missouri). Specifically, the Agreement provided that defendant (Ohio) Koch would assume all liabilities on (Missouri) Koch's December 31, 1968 balance sheet (with the exception of Federal Income Taxes) and all unpaid liabilities of (Missouri) Koch incurred in the ordinary course of business, or consented to by defendant (Ohio) Koch, from January 1, 1969, to the closing date of the transaction underlying the Agreement, with the exception of any liabilities aris-

ing from claims for damages based upon alleged violations of any federal, state or local law. The transaction was closed on May 1, 1969. Liabilities for damages based on alleged violations of the federal antitrust laws, such as those asserted by plaintiff in its complaint herein, were excepted from the liabilities assumed by (Ohio) Koch, and were not assumed by it.

Prior to May 1, 1969, (Missouri) Koch had been engaged in the business of manufacturing and selling refrigeration equipment, but had never sold or attempted to sell such refrigeration equipment or any other products in competition with those of plaintiff.

The purchase was made at arm's length and for adequate consideration.

Elliott-Williams Company is a corporation with its principal office in Indianapolis, Indiana. Elliott-Williams manufacturers coolers and refrigeration equipment and does business within this federal judicial district.

Traulsen & Co., Inc., is a corporation with its principal offices in College Point, New York. It is engaged in the manufacture and sale of refrigeration equipment and other products for food service establishments.

Victory Metal Manufacturing Co. (Inc.) is a corporation with its principal offices in Plymouth Meeting, Pennsylvania. It engages in the manufacture and sale of refrigeration and other equipment for food service establishments.

National Restaurant Association is a national association of restaurant operators. It has members and conducts business in this federal judicial district. Its principal office is in Chicago, Illinois.

Charles A. Farish has his principal office in Ann Arbor, Michigan. He is Executive Director of NSF, was Secretary of its Council of Public Health Consultants, Director of

NSFTL, and a member of the Executive Committee of both NSF and NSFTL.

Henry F. Vaughn is a former President and presently President Emeritus of NSF, a member emeritus of NSF Trustees, one of the incorporators of NSF, and Vice President of NSFTL. His principal office was in Ann Arbor, Michigan.

Robert M. Brown has his principal office in Ann Arbor, Michigan. He is President of NSF and NSFTL and a member of the Board of Trustees of NSF.

Thomas S. Gable has his principal office in Ann Arbor, Michigan. He was Assistant Executive Director of NSF and NSFTL and Director of Standards Development and Implementation of NSF.

Blucher A. Poole was a paid and retained consultant of NSF and formerly Chairman of NSF's Council of Public Health Consultants. He was until January, 1971, Assistant Commissioner, State Board of Health, State of Indiana, Indianapolis, Indiana.

John E. Vogt resides in Lansing, Michigan, and is Director, Division of Engineering, State Department of Health, State of Michigan, Lansing, Michigan. He is also a member of NSF's Council of Public Health Consultants.

Joel C. Beall resides in Macon, Georgia. He is Director, Environmental Health, Macon-Bibb County Health Department, Macon, Georgia. He was also Vice Chairman of NSF's Council of Public Health Consultants.

Harvey J. McPhee resides in St. Louis Park, Minnesota. He is Public Health Sanitarian, St. Louis Park Health Department and formerly Chairman of Food Equipment Standards Committee in National Association of Sanitarians.

This case has involved thousands of pages of record and hundreds of exhibits. Because court time must be

devoted largely to the trial of criminal cases, special procedures were devised in this case to permit the full development of a record and its presentation to the court without the necessity of using actual court time for oral testimony. The court proposed and the parties agreed that the procedure outlined below should be utilized to hear this case:

1. The liability issue was separated for trial.
2. Plaintiff's counsel was directed to submit to defendants' counsel, on or before a specific date, its proposed stipulation of facts and its designation of those portions of the depositions, answers to plaintiff's interrogatories, admissions by any defendant, documents, and other tangible evidence upon which it proposes to rely.
3. On or before a specific date (about 30 days later), defendants' counsel was required to advise plaintiff's counsel in writing of their objections to the plaintiff's proposed stipulations of fact and designated evidence. Simultaneously, defendants were to submit to plaintiff's counsel their proposed stipulations of fact and their designation of those portions of the depositions, answers to defendants' interrogatories, admissions by the plaintiff, documents, and other tangible evidence upon which they propose to rely.
4. On or before a specific date (approximately 30 days later), plaintiff's counsel was to advise the defendants' counsel in writing of his objections to the defendants' proposed stipulations of fact and designated evidence.
5. On or before a specific date (15 days later), counsel for all parties were directed to meet to resolve their differences with reference to the stipulations of facts and the proposed evidence to be considered by the court.

6. On or before a specific date (approximately 30 days later), the parties were directed to present to the court for judicial resolution those objections to proposed findings and evidence that could not be resolved otherwise.

7. On a date set by the court following the conclusion of the proceedings identifying the record, the parties were required to submit in open court an original and two copies of the agreed stipulations of fact, admissions, answers to interrogatories, designations of testimony and exhibits as to which no objections were made by any party; and admissions, answers to interrogatories, designations of testimony and exhibits as to which objections had been made, but were overruled by the court. The parties were also directed to submit a trial memorandum to the court at that time.

8. After the record was submitted to the court, the parties were to be permitted to appear in open court to summarize orally any part of the evidence to which they wished the court to direct its attention. They were also allowed to comment upon the opposing party's summary of evidence.

9. Thirty days following the oral hearing on the evidence, the plaintiff was to be required to file a brief in support of its claims on the liability issue and proposed findings of fact and conclusions of law. Fifteen days following the receipt of the plaintiff's brief, defendant was required to file a brief and proposed findings of fact and conclusions of law.

At a conference of all parties and the court, the court believed agreement had been reached to the effect that oral argument and oral summary of evidence was to be dispensed with, unless the court felt a need for it after examining the briefs and arguments and the proposed

findings filed by each party containing references to the documents and depositions made available to the court. The court also thought the parties at that time agreed that it should proceed to study the record, proposed findings and briefs and to decide the case and make findings and conclusions of law. As a result of this belief that there was an agreement among the parties, the court filed findings of fact and conclusions of law on January 7, 1977.

Thereafter, the plaintiff filed a motion to vacate and set aside the judgment, a motion for new trial and for amendment of judgment and a motion to amend and supplement findings of fact and conclusions of law indicating that plaintiff did not believe there had been an agreement to waive oral summary of evidence.

After examining the motions and responses, it was agreed that a full hearing should be had of the nature called for in the original agreement to permit the parties to summarize the evidence they specifically wanted to call to the court's attention. It was suggested that the parties consider the court's findings filed on January 7, 1977, as the court's proposed or tentative findings, and that the hearing should include a discussion of the correctness of these findings, as well as any other findings the parties might suggest.

The court spent three days listening to the parties summarize the evidence and argue the law. It was helped by the diligence of plaintiff's attorney in preparing 5 volumes of excerpts from the deposition evidence and the many exhibits arranged around the court's proposed findings. In each case, the court's proposed finding was set out, the relevant proposals from each of the parties and the evidence he believed to have a bearing on the subject. This help made the presentation smooth and interesting.

Thereafter, the court has again examined the briefs and proposed findings, the stipulations and the documents submitted to it. Although this case obviously has been

very time-consuming for the litigants and for the court, the in-court hearing time was held to a minimum. This procedure has enabled the court to resolve this case while observing the requirements of the Speedy Trial Act in criminal cases.

As a final result the court makes the following findings and conclusions of law. These findings are based on the court's proposed findings filed January 7, 1977. About one-third of them have been modified, some in major respects.

**FINDINGS**

1. The concept of establishing an organization to perform the same function for the food service industry with respect to sanitation that Underwriters Laboratory performs with respect to electrical safety originated as a result of discussions between Walter F. Snyder of the Toledo Health Department, defendant Henry Vaughan, then with the Detroit Public Health Service, and others at a meeting of the American Public Health Association in 1940. Discussions between these individuals and others ensued, culminating in a meeting in 1943 among representatives of defendant Hobart, Owens-Illinois, and Walter F. Snyder to explore the feasibility of establishing such an organization.

2. As a result of the foregoing discussions, the concept referred to above was expanded and implemented by the incorporation in 1944 of NSF, chartered for the purpose of promoting improvements in environmental sanitation and health.

3. The original incorporators of NSF were defendant Henry Vaughan, Dean of the School of Public Health, University of Michigan; Dr. Nathan Sinai, Professor of Public Health, University of Michigan; and Walter F. Snyder, Department of Public Health, Toledo, Ohio.

4. In addition to those persons identified above, the remainder of the original Board of Trustees were William

Klare, of the Statler Foundation, and Judge Arthur J. Lacey.

5. The Foundation was originally operated by a board of five trustees: three from the field of public health and two from the general public. The work of NSF was to be directed by three officers and two standing committees.

6. A major factor leading to the formation of NSF was the existence of conflicting requirements in thousands of local public health codes. To the extent that various jurisdictions maintained varying standards, products had to be manufactured differently for different jurisdictions.

7. After a clinic in 1948, planned and convened by NSF, which was attended by about 400 public health personnel and interested industrialists, and after receiving the concurrence of the Surgeon General of the United States, the American Public Health Association, and other public health organizations, NSF decided to promulgate standards for equipment which would protect the public health. The Clinic urged the National Sanitation Foundation to:

a. Undertake new and expanded research in the field of food sanitation.

b. Provide the medium for the discussion, interpretation and the acceptance by public health and industry of the results of research.

c. Distribute the results of accepted research to public health agencies and industry throughout the country.

d. Serve as a medium through which local areas may standardize their interpretation of uniform codes.

e. Develop an adequate, testing laboratory to which industry may send equipment and products for tests of sanitation qualities, on the assumption that health departments will accept the evidence of approval or rejection by the testing laboratory.

8. The U.S. Public Health Service encouraged NSF to develop standards in a manner similar to Underwriters Laboratories in order to promote public health in the United States; and it was contemplated that the NSF program would follow, and it in fact has followed, the Underwriters Laboratories' pattern.

9. NSFTL engages in research and testing of products to determine compliance with NSF standards and criteria, and issues seals and lists identifying products which comply with NSF standards and criteria.

10. In determining whether equipment complies with NSF standards, NSF has a stated policy that it will accept equipment evaluation and approval by any recognized and qualified laboratory (e.g., universities, foundations, etc.) if based upon NSF standards and criteria. There is no evidence in the record that indicates that it has deviated from this policy, although the publications of NSF often fail to mention the existence of this policy in connection with the description of procedures to be followed to obtain an evaluation and approval of equipment. Most descriptions of procedures to be followed indicate that equipment must be examined by the National Sanitation Foundation Testing Laboratory, although it is clear that outside laboratories are sometimes used.

11. Two devices are used by NSFTL to accomplish its purposes: the official "Listing" published by NSFTL showing the names and addresses of the manufacturers who have been found to comply with NSF standards and the NSF seal of approval which is a copyrighted device signifying compliance with NSF standards. The use of the seal to identify products that comply with NSF standards and criteria resulted from discussions by NSF with public health authorities, including the Conference of Municipal Engineers. The official "Listing" publication is sent by NSFTL to state and local health and sanitation officials throughout the United States and to trade associations,

purchasing agents, architects and food equipment consultants.

12. NSF standards and its seal have received the sanction, and support of the United States Public Health Service, which advised NSF that it would: (a) work with NSF in the development of standards; (b) consider equipment designed and constructed in accordance with NSF standards to be in compliance with Public Health Service-recommended ordinances and codes; (c) utilize equipment evaluations and special studies made by NSF; (d) consider as *prima facie* evidence of compliance with Public Health Service ordinances and codes, the NSF seal of approval and certification listing; (e) bring to the attention of NSF instances in which equipment bearing the NSF seal does not meet NSF standards; and (f) encourage state and local health authorities to communicate with NSF about matters involving NSF standards and criteria.

13. The NSF program has been endorsed by the American Public Health Association, the State and Territorial Health Officers Association, the National Association of Sanitarians and state and local health agencies.

14. NSF standards, its seal, and its listings are utilized in different ways by many, but not all, public health agencies throughout the United States. In Michigan, the seal is required on plastic pipe used for potable water, but is not required for food service equipment. Architects, in writing specifications for California state projects, specify the use of the seal, while Los Angeles regulations require that equipment meet NSF standards or equivalent, but do not require the seal. No state or local law of Georgia requires the seal, and equipment may be approved even if it doesn't meet NSF standards. In Indiana, the state recommends that municipal agencies utilize the standards, but except as to plastic pipe for potable water, use of the standards is not mandatory. The city of St. Louis Park, Minnesota, requires that NSF standards be met, but the seal is

not required. Public health agencies and officials, including those who have participated in the formulation of the NSF standards as consultants, have made their own unilateral decisions as to what, if any, aspects of the NSF standards program will be adopted in their jurisdictions, and those decisions have not been uniform. Many states and local governmental units by law or policy utilize the NSF standards as a minimum standard. Some states have higher standards. No state by law or policy requires the seal, although some local governmental units require the seal or a showing of equivalency.

15. Neither NSF nor NSFTL writes standards, but they do provide the mechanism through which users, public health officials, and industry may meet to develop standards for various types of equipment and devices which could adversely affect public health. NSF encourages public health officials and industry representatives to develop standards for equipment and devices which could adversely affect public health.

16. Most requests for NSF standards come from public health organizations; some come from the Council of Public Health Consultants; and some come from industry.

17. NSF Standard No. 7 provides sanitation requirements for new commercial refrigerators and food storage freezers used in food service establishments. That standard applies to reach-in refrigerators, reach-in frozen food cabinets, under-counter refrigerators, under-counter frozen food storage cabinets, refrigerated beverage coolers, and open-and-close refrigerators, as well as walk-in coolers and freezers to the extent that they are used in some large food service establishments. Where the standard describes parts and construction, it does so in terms of the qualities or conditions to be achieved: non-toxicity, smoothness, access for purposes of cleaning, and so on. The standard makes clear that substitutions and improved designs will comply:

"1.01 MINIMUM REQUIREMENTS: These are minimum requirements and variations may be accepted when they tend to make units more resistant to wear, corrosion, or more easily cleanable . . . .

"1.02 ALTERNATE MATERIALS: Wherever specific materials are mentioned, it is understood that the use of materials equally satisfactory from the standpoint of sanitation and durability will be acceptable."

18. After discussion among a number of industry representatives about the need for standards in the field of commercial refrigeration and freezers, the first draft of Standard 7 was screened by many public health professionals before it was submitted to industry members on March 26, 1958.

19. There was a subsequent meeting on May 7, 1958, attended by NSF and some manufacturers, at which NSF outlined its proposed new standard for commercial reach-in refrigerators.

20. Thereafter, on July 23, 1958, NSF formed an Industry Advisory Committee and a Special Public Health Committee for the purpose of formulating a standard that would satisfy minimum public health requirements for commercial refrigerators for use in food service establishments.

21. The members of the Special Public Health Committee for the development of Standard No. 7 were:

Chairman, M. S. Hilbert, Wayne County Dept. of Health, Eloise, Michigan

M. B. Crabill, Omaha-Douglas County Health Dept., Omaha, Nebraska

E. Ludwig, New York City Dept. of Health, New York, New York

A. F. Parrish, State Dept. of Public Health, Atlanta, Georgia

R. L. Tarbett, State Dept. of Public Health, Berkeley, California

T. E. Sullivan, State of Indiana Board of Health, Indianapolis, Indiana

J. W. Smith, State Department of Health, Richmond, Virginia

22. The companies represented on the Industry Advisory Committee in the development of Standard No. 7 were:

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| Traulsen & Co., Inc.<br>Flushing, New York | H. Traulsen (Chairman) |
| Foster Refrigeration Corp.<br>Hudson, New York | W. Whalen |
| Glenco Refrigeration Corp.<br>Philadelphia, Pennsylvania | J. P. Heilweil |
| Herrick Refrigerator Co.<br>Waterloo, Iowa | E. N. Northey, Jr. |
| Jewett Refrigeration, Inc.<br>Buffalo, New York | H. Ruslander |
| McCall Refrigerator Corp.<br>Hudson, New York | W. T. McCall |
| Silver Refrigeration Mfg. Corp.<br>Brooklyn, New York | M. Silver |
| Victory Metals Mfg. Corp.<br>Plymouth Meeting, Pa. | A. Raymond |
| Chrysler & Koppin Company<br>Detroit, Michigan | R. H. Koppin |
| Elliott-Williams Co., Inc.<br>Indianapolis, Indiana | J. H. Elliott |

23. After exchanging numerous drafts and after joint discussions, the members of the Industry Advisory Com-

mittee and the Special Public Health Committee submitted a mutually agreeable standard to the Joint Committee on Food Equipment for its evaluation and recommendation.

24. The permanent members of the Joint Committee on Food Equipment at the time were:

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| Chairman: C. L. Senn | Sanitation Director<br>Los Angeles City Health Department |
| William Bower | Supervisory Sanitarian<br>Oregon State Board of Health |
| Alfred H. Fletcher | Director, Div. of Environmental Health<br>State Department of Health<br>Trenton, New Jersey |
| William C. Miller, Jr.<br>John H. Fritz | Milk & Food Programs<br>Division of Sanitary Engineering Services<br>Dept. of Health, Education and Welfare |
| Morton I. Hilbert | Director, Bureau of Engineering<br>Wayne County Health Dept.<br>Eloise, Michigan |
| Ray B. Watts | Ohio State Health Dept. |
| Lt. Col. Robert G. McCall | Preventive Medicine Div.<br>Office of the Surgeon General<br>Department of the Army |
| Lt. Comdr. H. W. LeBleau | Bureau of Medicine and Surgery<br>Surgeon General's Office<br>Department of the Navy |

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| Kark K. Jones | State Board of Health<br>Indianapolis, Indiana |
| Capt. J. D. L. Grant | Director, Public Health Food and Equipment Research Dept.<br>National Restaurant Assn. |
| Lt. Col. Cardis W. Bryan | Office of the Director of Professional Services<br>Office of the Surgeon General<br>Department of the Air Force |
| Lt. Col. V. Harry Adrounie | U.S. Air Force Medical Service |
| Cmdr. R. T. Goerner, Jr.<br>U.S. Navy | Surgeon General's Office |
| Charles A. Farnish | Secretary NSFTL |

For the purpose of approving a standard, this permanent membership is augmented by the Industry Advisory Committee who participated in the development of the standard.

25. In April, 1960, the Joint Committee on Food Equipment recommended Standard No. 7 to the Council of Public Health Consultants for adoption.

26. The Council of Public Health Consultants was and is a committee which operates, without remuneration, under the aegis of NSF. A spokesman for the Secretary of Health, Education and Welfare has characterized this Council as follows: "The NSF does indeed retain a council of public health consultants which represents the nation's outstanding scientists and engineers in the field of sanitation. The consultants represent state and local health departments, universities, and do not include industry representatives . . . No consultant stands to gain or lose

by recommending approval or disapproval of NSF standards. We believe that all citizens gain by [Department of Health, Education and Welfare] participation in providing standardized equipment for sanitary handling of foods." Initially selected by NSF, and thereafter independently selecting their own replacements, the members of the Council of Public Health Consultants at the time it adopted Standard No. 7 on June 22, 1960, were:

R. Eliassen, Massachusetts Institute of Technology, Cambridge, Massachusetts

A. H. Fletcher, State Department of Health, Trenton, New Jersey

H. H. Hasson, W. K. Kellogg Foundation, Battle Creek, Michigan

H. G. Hanson, U.S. Public Health Service, Cincinnati, Ohio

M. S. Hilbert, Wayne County Health Department, Eloise, Michigan

C. W. Klassen, State Department of Public Health, Springfield, Illinois

F. Koriff, City Health Dept., Baltimore, Maryland

D. Lee, Florida State Board of Health, Jacksonville, Florida

J. Logan, Northwestern University, Evanston, Illinois

W. L. Mallmann, Michigan State University, East Lansing, Michigan

W. S. Mangold, University of California, Berkeley, California

S. Milliken, Public Health Federation of Greater Cincinnati Area, Cincinnati, Ohio

B. A. Poole, State Board of Health, Indianapolis, Indiana

J. D. Porterfield, M.D., Dept. of Health, Health Service, Washington, D.C.

C. Senn, Department of Health, Los Angeles, California

W. F. Snyder, National Sanitation Foundation, Ann Arbor, Michigan

J. Trichter, Dept. of Health, New York, New York

H. A. Whittaker, National Academy of Sciences, Washington, D.C.

27. Members of the Council of Public Health Consultants review drafts of proposed standards with members of their staffs who are experts in the area to be covered. The Council's function is to review the proposed standard to determine if it encompasses minimum health requirements for the particular equipment. It may not modify standards but must either approve or send them back for further review.

28. Following adoption by the Council of Public Health Consultants, the NSF Board of Trustees approved Standard No. 7. At that time the members of the Board of Trustees were:

Leroy E. Burney, formerly Surgeon General of the U.S.

Harvey J. Campbell, Executive Vice President, Detroit Edison Company

Walker L. Cisler, Chairman of the Board, Detroit Edison Company

Simon Den Uyl, Chairman of the Board, Bohn Aluminum and Gears Corporation

William G. Frederick, Professor, Department of Occupational and Environmental Health, Wayne State University

K. T. Keller, President, Chrysler Corporation

William Klare, Vice President, Statler Corporation

Judge Arthur J. Lacey

Joseph G. Molner, M.D., Commissioner of Health, Detroit

Leonard A. Scheele, formerly Surgeon General of the U.S.

J. Thomas Smith, Chairman of the Board, Dura Corporation

Walter F. Snyder, Executive Director, NSF

A. M. Turner, Vice President, Owens-Illinois, Inc.

Henry F. Vaughan, President Emeritus NSF, Dean Emeritus University of Michigan School of Public Health

The Board of Trustees has no responsibilities in the area of research or writing standards. It relies on the Council of Public Health Consultants to advise it on the public health aspects of the standards.

29. Standard No. 7 became effective in November, 1960.

30. NSF standards, including No. 7, are reviewed every three years. From time to time Standard No. 7 has been amended.

31. To cover the cost of equipment testing and plant inspection, NSFTL assesses its users an annual fee of $350. If a manufacturer elects to have its approved product listed under more than one name or under more than one standard, there is an additional charge of $200 and $100, respectively. If more than one plant must be inspected, there is an additional charge of $300 per plant. If the manufacturer has not participated in the formulation of the standard, there is a $750 one-time charge, used to defray the cost of updating and republishing the standard.

32. Plaintiff's net sales and after-tax profit for the years 1959 through 1970, inclusive, were as follows:

| Year | Net Sales | After-Tax Profit |
|---|---|---|
| 1959 | $ 601,463 | $ 23,634 |
| 1960 | 771,045 | 53,483 |
| 1961 | 773,794 | 49,826 |
| 1962 | 562,817 | 6,174 |
| 1963 | 603,339 | 7,030 |
| 1964 | 684,406 | 41,006 |
| 1965 | 1,055,550 | 110,206 |
| 1966 | 1,402,640 | 166,725 |
| 1967 | 1,706,466 | 217,942 |
| 1968 | 1,924,286 | 201,045 |
| 1969 | 2,058,953 | 132,075 |
| 1970 | 2,533,840 | 174,793 |

33. Plaintiff has manufactured walk-in coolers and freezers since 1953. In 1963, plaintiff entered the door business, and in 1964 began selling racks and other accessories. Plaintiff's net sales of coolers and freezers for 1959 through 1970, inclusive, were as follows:

| Year | Walk-In Coolers and Freezers Net Sales |
|---|---|
| 1959 | $601,462.89 |
| 1960 | 771,045.15 |
| 1961 | 773,793.66 |
| 1962 | 562,817.40 |
| 1963 | 502,402.87 |
| 1964 | 317,754.26 |
| 1965 | 391,356.64 |
| 1966 | 486,376.82 |
| 1967 | 558,363.20 |
| 1968 | 530,064.83 |
| 1969 | 576,502.00 |
| 1970 | 844,988.55 |

34. With two exceptions, all of plaintiff's sales of "walk-ins" have been to food markets, rather than food service establishments.

35. Some manufacturers (their identities varying with the equipment involved and including many not defendants in this action or even competing in the same product lines in which plaintiff is engaged) have participated in the initial formulation of standards criteria.

36. Some equipment manufacturers (but not all of those named as defendants in this action), have contributed financial support to NSF over and above its testing and inspection fees. Over the years since NSF was started, it has asked for and received substantial contributions from those industries and trade groups which are commercially interested in the NSF program. During this same period of time many of these same companies have paid substantial sums to NSFTL for its evaluation and certification program.

37. Neither plaintiff's competitors nor any other manufacturers have participated in the review and deliberation of the Council of Public Health Consultants or have voted to adopt standards. Rather, it is the uncontradicted fact that this function is performed solely by non-manufacturing consultants who have no commercial interest and no personal monetary stake in the standards or their effect upon the participting manufacturers.

38. Plaintiff knows of no instances, and the record is barren of any, in which defendants, NSF, National Restaurant Association, or any manufacturing defendant induced any public health agency to apply Standard No. 7 to food markets. Although NSF makes it clear that Standard No. 7 was not writen to cover food markets, the policy of NSF is as follows:

> "We feel that the actual application of the Standards to local requirements is a decision of local jurisdiction and that where any department feels a Standard can

be helpful in upgrading their general sanitation program, they should certainly feel free to use them to fullest advantage."

39. Each manufacturer participating in the development of Standard No. 7 had to comply with its provisions before it could display the seal and be listed.

40. There is no evidence that any manufacturer of coolers represented to any purchaser or potential purchaser of coolers that NSF standards apply to food markets. NSF representatives have publicly stated and have advised public health officials that Standard No. 7 was drafted to apply only to public eating and drinking establishments. Plaintiff acknowledges it has no evidence of NRA action to encourage application of NSF Standard No. 7 other than to food service establishments.

41. NSF recommends that regulatory agencies use NSF standards as a standard for acceptance of equipment and devices covered by the standards.

42. NSF has recommended that states should not require the NSFTL seal as a matter of law. NSF does promote the seal as a *prima facie* indicium of compliance with the relevant NSF standard, although early in the program in the 1950's and 1960's there is evidence that NSF and its employees urged that regulatory agencies require the use of the seal. This has not been been true recently, in the past ten years. There is no evidence that any other defendant promoted or sought the adoption by public health agencies and officers of the NSF approval listing or seal as a requirement for approval.

43. NSF has promoted the adoption by public health agencies and officers of its standards and the use of its listing or seals as useful evidence of *prima facie* compliance with those standards. An example of NSF policy in connection with promotion of NSF standards is shown by their suggestion for regulatory language:

"SUGGESTIONS CONCERNING REGULATIONS GOVERNING THE SANITATION OF COMMERCIAL POWERED FOOD PREPARATION EQUIPMENT"

"It is strongly recommended that NSF Standards, representing a cross-section of opinion of workers in the field of environmental health, be accepted and followed by enforcement officials. However, their incorporation in detail into local sanitary codes does not appear to be necessary and is likely to be cumbersome.

"In municipalities, counties, and health districts in which the adoption of legislation by reference is considered legal, the following regulation should serve to implement the use of this Standard for Commercial Powered Food Preparation Equipment:

"ALL COMMERCIAL POWERED FOOD PREPARATION EQUIPMENT INSTALLED ON OR AFTER IN FOOD SERVICE ESTABLISHMENTS IN THIS JURISDICTION SHALL MEET THE NATIONAL SANITATION FOUNDATION STANDARDS FOR SUCH EQUIPMENT.

"or, if considered desirable, it will be simpler to adopt the following more general regulation applying to all NSF Standards in the food service field:

"ALL EQUIPMENT INSTALLED ON OR AFTER FOR USE IN THE PREPARATION OF FOOD IN PUBLIC FOOD SERVICE ESTABLISHMENTS IN THIS JURISDICTION SHALL MEET NATIONAL SANITATION FOUNDATION STANDARDS.

"In fact, the adoption of this broad regulation will save time as well as advertising and printing costs as, no doubt, many different standards will be adopted. Otherwise, each standard will require the adoption of a specific regulation.

"Wherever the legality of adopting legislation by reference is not recognized, delete the portion of either of

the above regulations after the word 'SHALL' and substitute therefor the words 'BE OF A TYPE APPROVED BY THE HEALTH OFFICER'. The health officer may be guided by the National Sanitation Foundation Standards in his approval of types."

44. The record demonstrates that NSF has furnished its services to interested manufacturers, users, and public health officials and consultants for evaluation and possible promulgation of standards proposed and formulated by them.

45. The record is devoid of evidence from which any inference can be drawn that any NSF employee or consultant, whether or not a public health official, has been corrupted, bribed, or otherwise influenced improperly in formulating and adopting NSF standards, in promoting the adoption of NSF standards by public health authorities, or in testing and inspecting equipment to determine compliance with NSF standards.

46. There is no evidence that any defendant told any customer or potential customer that any of plaintiff's products failed to satisfy the requirements of any NSF standard.

47. There is no evidence in the record that any defendant urged exclusion by customers or others of plaintiff's products because they do not bear the seal or are not in the listing publication.

48. Prior to this action, defendant manufacturers, Victory Metal, Traulsen, Hobart and Koch had never heard of Eliason; had never confronted Eliason products in the market place; had never made walk-in coolers or freezers; and had never sold refrigeration products to food markets.

49. There is no evidence or any record basis for an inference that any public health agency or official acted other than honestly and in good faith in the exercise of

official authority and discretion in adopting or resorting to, wholly or in part, NSF standards, approval listings, or seals.

50. There is no evidence that the standards are in any way unreasonable or arbitrary in their content or discriminatory in their application, or that their objectives are illegitimate or undesirable.

51. There is no evidence and plaintiff does not complain that its products have been denied testing, approval listing, or the NSF seal, or that it has been treated by NSF differently than its competitors or other manufacturers.

52. There is no evidence that the fees charged by NSFTL for testing equipment and inspecting production facilities are unreasonable in relation to the cost of such services, or that such fees impose an economic burden on manufacturers choosing to use the NSFTL approval listing or seal.

53. The record does not support plaintiff's position that private architects have been induced by NSF to require compliance with NSF standards, listings, or seals, although early in the program NSF employees made a systematic effort to contact architects and spread the word about NSF standards and its seal of approval. The evidence indicates that the NSF standards actually come from the various health departments to the architects, as would many code requirements. The evidence does not show that any customer has required compliance with standards, seal, or approval listing other than in response to public health authority regulations.

54. Plaintiff has sold its products in jurisdictions which as a matter of law required compliance with NSF standards or the NSFTL seal.

55. A few public agencies and officials have required NSFTL approval and listing, but the record fails to show

that any significant number of public agencies or officials have adopted any absolute requirement that equipment like that of the plaintiff must have the NSFTL approval listing or seal. Moreover, with at most a single exception, the record shows that even in those few instances where any seal or listing requirement had been adopted, agencies have authorized installation of such equipment after testing it for compliance with their sanitary requirements. NSF has engaged in an advertising campaign in, among others, the Wall Street Journal and the Reader's Digest, as well as in trade journals and brochures, to promote acceptance of its seal of approval to indicate that the product on which the seal appears complies with NSF standards and to suggest that it is sanitary and safe. The expressed intention of the advertising program was to support products that have the NSF seal.

56. In August, 1962, plaintiff submitted an application to NSFTL for the testing of its walk-in coolers under Standard No. 7, but later withdrew its application and, upon request, had its money ($1,250) refunded.

57. With reference to its August, 1962 application, plaintiff rejected NSF; NSF did not reject Eliason.

58. On April 14, 1971, a meeting was held of prospective industry sponsors of a food market standard. Plaintiff was invited to attend and did send representatives who tape-recorded the session.

59. Plaintiff elected not to attend any other meetings of a committee established to formulate a food market standard, although it was free to do so.

60. There is not, at this date, a standard for food markets (NSF or otherwise) even though four to six public health agencies, without urging or approval by NSF or any other defendant, require food market coolers and freezers used in their jurisdictions to meet Standard No. 7 requirements. Manufacturing defendants, *e.g.*, the Tyler Division of Clark, oppose the application of Standard No.

7 to food stores; and the equipment they sell to such customers does not comply with the standard or bear the NSF seal.

61. Plaintiff has sought the assistance of the Federal Trade Commission and the Department of Justice in its fight against NSF. After an 11-month investigation in 1969, the FTC advised plaintiff: "On the basis of information developed in that investigation, we see no evidence that the standards employed by the Foundation are discriminatory or otherwise unfair within the meaning of the Federal Trade Commission Act or any of the other statutes administered by the Commission." The Antitrust Division of the Department of Justice, after asking for "substantial evidence" and advising that "you should bear in mind that the promotion of the adoption of a requirement by public agencies that particular products bear a seal of approval by a private, scientific association is not, without more, unlawful under the antitrust laws," ultimately advised plaintiff that: "On the basis of our review of these documents and of previous communications from Mr. Eliason, we have concluded that further investigation and/or action by the Department of Justice under the federal antitrust laws would not be warranted at this time."

62. Relying upon the personal political and economic philosophy of its principal, plaintiff opposes *all* standards promulgated wholly or in part by private entities and, particularly, any privately conducted testing procedure for compliance which results in a seal or approved listing even though the cost of such testing is reasonable.

63. There is no evidence in the record that either defendant, Hobart, or defendant, (Ohio) Koch, or (Missouri) Koch, participated in the *promulgation* of NSF Standard No. 7. Nevertheless, it is clear that (Missouri) Koch did participate in the development of Standard No. 7 before its president became angry at those involved in developing the standard. It is also clear that (Missouri) Koch later became an industry participant in the NSF

Standard No. 7 program. The record also indicates that (Ohio) Koch is an industry participant in the Standard No. 7 program. Defendant, Hobart, although not a direct participant in the Standard No. 7 program, was one of the original industry supporters of NSF and an active participant in the total program of NSF and NSFTL.

## CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter of this action.

2. This court has jurisdiction over plaintiff and each defendant except Joel C. Beall, Blucher A. Poole and Harvey J. McPhee; said defendants Beall, Poole and McPhee are hereby dismissed as defendants.

3. Venue of this action is proper in the Eastern District of Michigan.

4. To establish a conspiracy in violation of Section 1 of the Sherman Act, plaintiffs must establish that identified parties conspired to impose unreasonable restraints on interstate commerce. In order to sustain the conspiracy element of a Section 1 case, it is necessary for plaintiff to establish by facts in the record that two or more persons [including a defendant] combined to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means, and the kind of agreement or understanding which existed as to each defendant. The scope of each defendant's participation in this agreement, if any, must be determined individually from the evidence proved as to that defendant. To establish a conspiracy in unreasonable restraint of trade, plaintiffs must show either that any conspiracy that is proved falls within one of the categories of *per se* offenses (*e.g.*, price fixing, division of markets or customers, or group boycotts), or that any such conspiracy is unreasonable when tested by the rule of reason.

5. In order to establish a monopolization violation of Section 2 of the Sherman Act, plaintiff must establish the

existence of a relevant product and geographic market; that defendants possessed monopoly power within that relevant market; and that such monopoly power was willfully acquired or maintained by such defendant.

6. In order to establish an attempt to monopolize in violation of Section 2 of the Sherman Act, plaintiff must establish the existence of a relevant product and geographic market; that defendants had the specific intent to acquire monopoly power within that relevant market; that defendants took steps to achieve that purpose; and that defendants posed a dangerous probability of success in obtaining such monopoly power.

7. The facts of record fail to establish any violation of Section 1 of the Sherman Act:

(a) Plaintiff has failed to prove any group boycott in *per se* violation of the Sherman Act in tha the record demonstrates that the NSF standards rogram was not established with, nor is it carried on with, any anti-competitive purpose to stifle competition or unreasonably exclude plaintiff or others from competing;

(b) Rather, the record demonstrates that the primary purpose behind the NSF standards program has been pro-competitive in attempting to promote uniform standards among public health jurisdictions, thereby minimizing the number of differing, even conflicting, requirements, reducing costs for all manufacturers, and increasing the number of manufacturers able to compete in each jurisdiction;

(c) There is no evidence in the record, nor is it charged, that there was price fixing, division of markets or divisions of customers.

(d) Measured by the rule-of-reason standard, the record fails to show any other violation of Section 1 of the Sherman Act, for the following reasons:

(1) The record fails to show that the content of any NSF standard, including Standard No. 7, is unreasonable, burdensome or arbitrary, and there is no showing that plaintiff's equipment fails to comply with any NSF standard by which it may be covered;

(2) The record establishes the reasonableness of the procedure for formulating NSF standards, including Standard No. 7, in that spokesmen for all interested parties—including any manufacturer who chooses to participate, users or customers, public health officials and sanitation experts—are offered the opportunity to and do present their views and contribute to the formulation of NSF standards, so that the interests of one group are not controlling and conflicts are resolved with the participation of all interested parties;

(3) The record establishes the reasonableness of the procedure for adoption of NSF standards, including Standard No. 7, in that NSF standards can be adopted only upon the vote of the Council of Public Health Consultants, which is comprised exclusively of public health officials who have no commercial or personal monetary interest in the standards or their effect upon any manufacturer;

(4) The record establishes that the NSF standards program, including Standard No. 7, is not unduly burdensome, in that satisfactory product performance is an alternative to meeting construction or design requirements, and in that the standards allow competitive innovations and adoption of more efficient and economical manufacturing processes. Standard No. 7 expressly provides that variations may be accepted and that whenever specific materials are mentioned, alternates may be substituted;

(5) There is no evidence in the record that the NSF standards program, including Standard No. 7, is arbi-

trary, discriminatory, or unduly burdensome, in that there is no evidence that the equipment of plaintiff or any other manufacturer has been refused testing, approval listing or the NSF seal on the same basis available to other manufacturers, and the fees charged for such services are not unreasonable in relation to the cost thereof and do not pose any practical or economic burden to plaintiff.

(e) No defendant has attempted to coerce plaintiff to comply with NSF standards;

(f) No defendant has urged users or other private parties to exclude plaintiff's products because such products lack the NSF seal or approval, or because such products fail to comply with any NSF standard;

(g) The burden imposed on plaintiff by widespread customer and other private party acceptance of the NSF standards and seal or approval listing, does not in itself establish any conspiracy in unreasonable restraint of trade. When a privately promulgated standard, including one which has not been adopted by governmental agencies as a legal requirement, is fair and reasonable both in its content and application, as is Standard No. 7, the impact resulting from private acceptance and exclusion of competing products not thus approved does not constitute an unreasonable restraint of trade, see *Structural Laminates, Inc.* v. *Douglas Fir Plywood Association*, (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969);

(h) The conduct of some defendants in soliciting and urging other governmental defendants to adopt NSF findings, listing and seal as binding in their jurisdictions is immunized by the *Noerr-Pennington* doctrine [*Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and

*United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).] Any restraint flowing from the governmental adoption of such requirements is beyond Sherman Act challenge as state action under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1934). This principle is particularly true where, as here, there is no evidence that any governmental personnel, either in consulting with NSF or in adopting any NSF-promulgated requirements in their public health jurisdiction, have been corrupted, bribed or otherwise improperly influenced, and there is no showing that their adoption of such requirements was not a lawful exercise of their official authority and discretion.

8. The record fails to establish the offense of monopolization under Section 2 of the Sherman Act, in that:

(a) There is no evidence from which a relevant product and geographic market can be determined;

(b) The evidence does not support a conclusion that any defendants individually or collectively possessed monopoly power within any relevant market.

9. The record fails to establish the offense of an attempt or conspiracy to monopolize under Section 2 of the Sherman Act, in that:

(a) There is no evidence from which to determine the existence of a relevant product and geographic market;

(b) The evidence does not support a conclusion that any defendant had the specific intent to acquire monopoly power within a relevant market;

(c) The evidence does not support a conclusion that any steps were taken to achieve the objective of obtaining monopoly power;

(d) The evidence does not support a conclusion that defendants, individually and collectively, have posed a dangerous probability of success in obtaining monopoly power within a relevant market.

10. In summary, there are no facts in the record from which to conclude that any defendant has violated any provision of the Sherman Act.

11. Plaintiff's complaint must be and hereby is dismissed.

12. Judgment will be entered for the defendants, at plaintiff's costs.

So ordered.

/s/ CHARLES W. JOINER
Charles W. Joiner
United States District Judge

Dated: June 3, 1977

Detroit, Michigan

## EXHIBIT C

EXCERPT OF TESTIMONY OF PROFESSOR CHARLES L. SENN AS TO EFFECTIVENESS OF THE SEAL OF APPROVAL AS A RESTRAINT ON TRADE IN THE FOOD-SERVICE FIELD

Professor Charles L. Senn, presently employed at the University of California at Los Angeles as a lecturer in Public Health and who was a member of the NSF Council of Public Health Consultants from 1949 to the late 1960's and also served as chairman of the NSF Joint Committee on Equipment Standards and as a member of the NSF Board of Trustees, was asked if it would be difficult for a manufacturer to market on a national basis, equipment that did not bear the NSF seal, stated: "I would say, in answer to your question, that if you were attempting to market food service equipment for commercial food service establishments, it would be difficult to market this unless it had a Seal of Approval." (App. Vol. II, p. 553.)

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## EXHIBIT D

### Illustrations in the Record of Defendants Urging That Seal of Approval Be Used to Restrain Competition

Contrary to its current protestation, NSF has had a long history of urging that government and the public demand the NSF Seal. The following is merely by way of illustration and not as a summary of all the evidence on this point:

1. In 1954 NSF published and distributed to public health agencies, literature for subsequent redistribution by the governmental agency with their name imprint, a pamphlet singing the praises of NSF and stating, "when properly installed, all new . . . food service . . . equipment which bears the National Sanitation Foundation (N.S.F.) Testing Laboratory SEAL OF APPROVAL *will be approved by the health department* . . .", that "any food-service establishment operator can now order new equipment with *perfect confidence* because he knows, *in advance* . . . that, when properly installed it will get immediate official approval by the health department" and that the buyer should "ask for N.S.F. Testing Laboratory SEAL OF APPROVAL on the next piece of equipment" ordered for his place. (App Vol IV, pp 10, 11)

2. The NSFTL field representative sought out and convinced key food service equipment architects throughout the country to require the NSF Seal as a part of their plans and specifications. (App Vol II, pp 475-479)

3. NSF gave notoriety to the fact that health departments around the country were demanding the NSF Seal. (App Vol III, pp 240, 297-D, 306-A; Vol IV, pp 3-B, 229)

4. On November 16, 1955 at a meeting of the NSF Council of Public Health Consultants, Defendant Charles A. Farish reported:

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"The reaction of industry to the National Sanitation Foundation seal of approval program has been very encouraging.

A. The majority of manufacturers who are using the seal of approval program feel that the standards program is a solution to many of their problems.

B. A very few manufacturers appear to be interested only as far as they can see a demand for approved equipment. This group would have no interest in the standards program if they could sell their equipment in areas that are beginning to demand National Sanitation Foundation approval.

C. The majority of equipment manufacturers now using the National Sanitation Foundation seal of approval feel that the time has arrived for health agencies to take a stand one way or another regarding National Sanitation Foundation approved equipment. They are wondering why more health agencies are not recognizing the standards and taking some definite official action to implement the program. (App Vol IV, p 226)

5. At the 1959 Annual Meeting of the NSF Joint Committee on Food Equipment Standards, Defendant Tom S. Gable discussed with the NSF Joint Committee the possibility and advisability of establishing a provision in the various NSF Standards which would require the affixing of the NSF Seal to equipment which is in compliance with the standard. He cited as an example the ASME Boiler Code which "allows local officials to require the ASME (seal), as well as conformance with the standard." Gable further stated:

"If such a provision were included in the NSF Standards, it would effect the following: (a) mandatory fixing of the Seal to equipment by the manufacturer

> if the equipment is in compliance with the standard, thus assuring the local health officials that any equipment which was Approved-Listed would display the Seal as well; (2) *permit* local health agencies to require the NSF Seal of Approval on food service equipment by adopting the NSF Seal of Approval on food service equipment by adopting the NSF Standard. (App Vol IV, p 265) [Emphasis supplied]

Subsequently, on October 5, 1965 the Executive Director of NSFTL issued a memorandum to the participants in the NSF Seal of Approval Programs for food equipment which stated:

> "Effective January 1, 1966, The Testing Laboratory will establish a policy to the effect that unless equipment in the field bears the NSF Seal of Approval, of the numbered type . . . the equipment in question will not be considered approved."
>
> * * * *
>
> "Notification of this policy will be distributed to the federal, state and local health agencies shortly after January 1, 1966." (App Vol IV, p 363)

6. In 1963 in a statement setting forth the benefits it was stated:

> "The Listing and Seal of Approval Programs are widely recognized and used across the nation, thereby nearly eliminating the necessity of obtaining local and state approved acceptance by individual companies." (App Vol III, p 221, 222)

7. In 1966 in a speech to the Annual Meeting of the Food Service Equipment Industry, Inc., Defendant Charles Farish, Executive Director of both NSF and NSFTL, said:

> ". . . Is the time approaching when you will find it more advantageous to handle only NSF approved

equipment? Perhaps a target date for such action should be considered by FSEI? (App Vol IV, p 181)

8. In March of 1967 NSFTL issued a memorandum to all NSF Seal of Approval participants, stating:

> "The Testing Laboratory would like to encourage the display of the NSF Seal at all national, state and local equipment shows and on equipment displays in a manufacturer's facilities. It is our belief that widespread use of the Seal of Approval by manufacturers will encourage and stimulate control agencies, as well as purchasers of equipment, to request this Seal on the equipment or product. (App Vol IV, p 328)

9. In 1967 NSF, together with its Council of Public Health Consultants, published and for several years thereafter circulated to all industry and public health officials concerned with the NSF program, a statement in brochure form recommending:

> "Including in all rules and regulations involving eating establishments requirements that NSF Seal of Approval be carried on all equipment for which such is available." (App Vol III, p 73c; Vol IV, pp 185, 219)

10. Thereafter NSFTL issued to NSFTL participants a list of various slogans which they were authorized to use in publicizing their NSF Seal. These slogans included: (App Vol V, p 259)

1. Health departments welcome this seal on equipment which must pass inspection for local installation.
2. Our products with this seal are listed with official health departments throughout the United States.
3. Sanitation Means Better Business—Insist on this Seal on Products You Buy

11. In 1974 NSF embarked upon a national advertising and marketing program, the goals of which included the announcement of NSF's "serious intention to provide national advertising and marketing support for products bearing the NSF Seal."

NSF also announced:

> "NSF also plans an important supplement to the advertising program. Charles Farish, our Executive Director, will play an important role in contacting regulatory officials personally to better acquaint them with the merits of the NSF program. His long experience and many contacts are expected to aid in this venture to *acquaint regulatory officials with reasons why they should support and specify products bearing the NSF seal* . . ." (App Vol V, pp 261, 262) [Emphasis supplied]

**EXHIBIT E**

**Advisory Opinion Digest No. 457**
**Legality of a Proposed Standard Certification Program.**

**(File No. 713 7002)**

*Second Opinion Letter*

MARCH 8, 1971

DEAR MR. ROCKWELL:

The Commission has given further consideration to your request for an advisory opinion on the legality of a proposed standard certification program, and in an effort to be as helpful as possible in this important and difficult area involving programs of self-regulation believes that it would be desirable to amplify its letter to you of December 29, 1970, with the following comments.

The Commission is sympathetic to the growing interest in the development of plans for self-regulation which will avoid the strictures of the antitrust laws. On the other hand it is mindful of its responsibility to evaluate all such plans in light of the many anticompetitive potentialities inherent therein.

Some of the matters which must be considered in an evaluation of any program of self-regulation are:

1) Standardization and certification programs must not be used as devices for fixing prices or otherwise lessening competition. *See, e.g., Milk and Ice Cream Can Institute* v. *F.T.C.*, 152 F.2d 478 (7th Cir. 1946).

2) Standardization and certification programs must not have the effect of boycotting or excluding competitors. *See, e.g., Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

3) Standardization and certification programs must not have the effect of withholding or controlling production.

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*See, e.g., Standard Sanitary Mfg. Co.* v. *United States,* 226 U.S. 20 (1912); *National Macaroni Manufacturers Ass'n* v. *F.T.C.,* 345 F.2d 421 (7th Cir. 1965).

4) Construction or specification standards should not be used except in exceptional circumstances and never when performance standards can be developed.

5) It is incumbent upon any organization sponsoring, adopting, administering or enforcing standards to insure that its standards reflect existing technology and are kept current and adequately upgraded to allow for technological innovation.

6) Where certification is involved, no applicant for certification may be denied certification for any of the following reasons: (a) that he is a nonmember of any association or organization; (b) that he is a foreign competitor; or (c) that he is unable to pay the fee or cost charged for certification. *See* Advisory Opinion Digest No. 152, 3 CCH Trade Reg., Rep. para. 18, 125 (December 13, 1967).

7) Fees charged in connection with participation in a standardization or certification program must be reasonable as related to the direct and indirect costs involved.

8) Membership in groups or organizations sponsoring, promulgating or administering standardization or certification programs must be open to all competitors, domestic or foreign.

9) Due process must be accorded all parties interested in or affected by a standardization or certification program, including suppliers, manufacturers, distributors, customers and users. Due process includes, but is not limited to, the conduct of timely hearings with prompt decisions on claims respecting standards or the denial of certification.

10) Standards and certification programs, unless otherwise clearly required by considerations of safety, may not

be used to reduce, restrict or limit in any manner, the kinds, quantities, sizes, styles or qualities of products. *See, e.g.,* the consent decree in *United States* v. *General Electric Co.,* 1956 Trade Cas. paras. 67,714, 67,794, 67-795, 67,796 (D.N.J.1954).

11) The exercise of the responsibility of validating any proposed standard should include a determination by a laboratory or other appropriate entity independent of those immediately affected by the proposed standard that the criteria set forth in such standard are meaningful and relevant. *See, e.g.,* the consent decree in *United States* v. *Southern Pine Ass'n,* 1940-43 Trade Cas. para. 56,007 (E.D. La. 1940).

12) The function and responsibility of determining whether any product is to be certified under any program involving certification should be performed by an appropriate organization independent of those immediately affected by such program. *United States* v. *Southern Pine Ass'n, supra.*

13) Representations made by standards organizations with respect to testing procedures, standards, etc., must be truthful. *See, e.g., In the Matter of Parents' Magazine Enterprises, Inc.,* FTC Dkt. No. C-1133 (1966).

14) In cases involving a challenge to standards, the burden of proof respecting reasonableness is upon those who develop and enforce the standards. *Kestenbaum, Antitrust Questions In Voluntary Industry Standards,* p. 10, Address prepared for delivery before the National Association of Manufacturers Marketing Conference (October 9, 1969).

15) All standards must be voluntary.

16) Certification programs should avoid the use of single standard, "pass/fail" systems and, in lieu thereof, employ graded systems which preserve consumer and user options.

The foregoing criteria, which are by no means exhaustive, demonstrate the many factors which make it difficult to approve a standard certification program such as the one you suggest. The difficulty is increased by the uncertainty which exists in the court decisions on this subject. Accordingly, the problems of establishing a program which will qualify for approval before it can be seen in action are formidable.

Nevertheless, the Commission would like to assist in exploring the possibilities of self-regulation through standard certification. To that end it has directed its staff to commence an in depth study of the subject to determine whether it is possible for the Commission to make a meaningful contribution to the development of a satisfactory and legal program.

The Commission is not presently in possession of sufficient information to enable it to make all of the determinations essential to an evaluation of your program. Even if this information were furnished, the Commission feels that it would be inappropriate for it to act in this area until the results of its present study are known. It must, therefore, decline to act at this time on your request for an advisory opinion.

By direction of the Commission.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 1759

ELIASON CORPORATION,
Petitioner,

v.

NATIONAL SANITATION FOUNDATION, et al.,
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## OPINION BELOW

The opinion of the court of appeals is reported at 614 F.2d 126 and is printed in the appendix to the petition (1a-10a). The district court's findings and conclusions are not reported but appear at 11a-43a of that appendix.

## QUESTIONS PRESENTED

1. Is petitioner entitled to a review by this Court of the findings of the district court, affirmed by the circuit court, that minimal sanitation standards, not claimed to be unreasonable or discriminatory in content or application, did not violate the Sherman Act if promulgated by a private foundation and coupled with testing procedures which resulted in an approval listing and seal evidencing *prima facie* compliance, where all interested parties participated in the formulation of those standards and the charge for testing was reasonable in relation to its costs?

2. Was the court of appeals required to review *de novo* a massive trial record where petitioner had stipulated to submission of the case to the trial court on a paper record and petitioner was allowed three days to summarize and characterize its evidence and to argue its legal contentions to the trial judge?

## STATEMENT OF THE CASE

This private, treble damage antitrust case involves the formulation of minimal health standards, covering a broad variety of products, under the aegis of a non-profit private organization, the respondent National Sanitation Foundation (NSF), founded in 1944. Its subsidiary, the National Sanitation Foundation Testing Laboratory (NSFTL), tests products submitted by interested manufacturers and prepares lists of approval and issues seals to those whose products comply with those standards. NSF has promoted the adoption by public health agencies and officers of its

standards and the use of its approval listing or seal as useful evidence of *prima facie* compliance with those minimal standards.

The other respondents include some of the manufacturers who have availed themselves of this NSF program and obtained approval for numerous different kinds of commercial refrigeration equipment (most of which are not competitive with petitioner's equipment) used in food service establishments, the National Restaurant Association, public health officials as a purported class, and nine individuals who are or have been officials with various state and other public health agencies or who have been associated with NSF.

Petitioner, Eliason Corporation, manufactures and sells walk-in coolers and freezers. Virtually all of its sales have been to food stores and supermarket chains such as National Tea and A&P.* Petitioner's complaint focuses on NSF Standard No. 7, which covers sanitation requirements for commercial refrigerators and food storage freezers used in restaurants and other food service establishments. Petitioner alleges that respondents "have engaged in a conspiracy to cause purchasers of products 'which have a relation to or bear on public health and sanitation to refuse to deal with manufacturers of such products who are not approved by NSF, and to refuse to purchase such products which do not carry the seal of approval of NSF,' the 'essence' of that conspiracy being 'to force a boycott' of products not approved by NSF." (11a). Petitioner contends that respondents have violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

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*As found by the trial court, respondents Hobart, Koch, Traulsen and Victory had never heard of petitioner, did not make the same products, and did not sell to the same type of customer or otherwise compete with petitioner (34a).

The trial court found that the NSF seal is promoted merely as *prima facie* evidence of compliance with the NSF standards (32a-34a). While a few public health agencies or officials have required the approval listing or seal, the court found that the evidence fails to show that any significant number have adopted any such requirement as an absolute and that, with at most one exception, even in those few instances installation of unapproved equipment has been authorized after it was tested for compliance with the local sanitation requirements* (35a-36a). The trial judge also found that petitioner has succeeded in selling its products even in those jurisdictions which required compliance with the NSF standards (or even the seal, in those instances where it has been required) (35a-36a).

Based upon the massive record developed over four years of vigorous and detailed discovery initiated by the petitioner, the district court held that, measured by the rule of reason standard, the record fails to show any violation of either Sections 1 or 2 of the Sherman Act. The Court, after its own independent, meticulous review of evidence, followed by three days of detailed oral characterization by petitioner's counsel of that evidence and argument as to the inferences to be drawn from it, concluded as follows (38a-41a):

> (1) The record fails to show that the content of any NSF standard is unreasonable, burdensome or arbitrary and there is no evidence that plaintiff's equipment fails to comply;

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*In its brief to the trial court (p. 387), petitioner conceded that health officials using the NSF seal as a means of evaluating equipment nonetheless "make an independent evaluation of a product if it does not bear the NSF seal."

(2) The record establishes the reasonableness of the procedure for formulating NSF standards in that spokesmen for all interested parties, including any manufacturer who chooses to participate, users or customers, public health officials and sanitation experts, are afforded the opportunity to and do present their views and contribute to the formulation of those standards, so that the interests of one group are not controlling and conflicts are resolved with the participation of all interested parties;

(3) The record establishes the reasonableness of the procedure for adoption of NSF standards in that they can be adopted only upon the vote of the Council of Public Health Consultants, which is comprised exclusively of public health officials who have no commercial or personal monetary interest in the standards or their effect upon any manufacturer;

(4) The record establishes that the NSF standards program is not unduly burdensome, in that satisfactory product performance is an alternative to meeting construction or design requirements, and in that the standards allow competitive innovations and adoption of more efficient and economical manufacturing processes (*e.g.*, Standard No. 7, which would cover petitioner's refrigeration equipment if sold to food service establishments, expressly provides that variations may be excepted and that whenever specific materials are mentioned, alternates may be substituted);

(5) There is no evidence that the equipment of petitioner or any other manufacturer has been

> refused testing, approval listing or the NSF seal on the same, non-discriminatory basis available to other manufacturers, and the fees charged for such services are not unreasonable in relation to the cost thereof and do not pose any practical or economic burden to petitioner;
>
> (6) No respondent has attempted to coerce petitioner to comply with NSF standards; and
>
> (7) No respondent has urged users or other private parties to exclude petitioner's products because they lack the NSF seal or approval, or because such products fail to comply with any NSF standard.

The district court also rejected petitioner's contentions that the respondents have engaged in a group boycott constituting a *per se* violation of the Sherman Act. The trial judge found:

> A major factor leading to the formation of NSF was the existence of conflicting requirements in thousands of local public health codes. To the extent that various jurisdictions maintained varying standards, products had to be manufactured differently for different jurisdictions (19a).

In its conclusions of law, the district court then held that the primary purpose behind the NSF standards program has been pro-competitive in attempting to promote uniform standards among public health jurisdictions, thereby minimizing the number of differing, even conflicting requirements, reducing costs for all manufacturers, and increasing the number of manufacturers able to compete in each jurisdiction

(39a). Based upon its careful analysis of the evidence, the court concluded that "plaintiff has failed to prove any group boycott in *per se* violation of the Sherman Act in that the record demonstrates that the NSF standards program was not established with, nor is it carried on with, any anticompetitive purpose to stifle competition or unreasonably exclude plaintiff or others from competing." (39a).

The trial judge characterized petitioner's position: "Relying upon the personal political and economic philosophy of its principal, plaintiff opposes *all* standards promulgated wholly or in part by private entities and, particularly, any privately conducted testing procedure for compliance which results in a seal or approved listing even though the cost of such testing is reasonable." (37a) (court's emphasis).

The district court, holding that there was no violation of Section 2, concluded that the record failed to establish any relevant product and geographic market, the existence of monopoly power, any specific intent or steps taken to acquire such power, or any dangerous probability of success in obtaining such power (42a-43a).

The court of appeals affirmed, holding that petitioner had failed to show violations of either Sections 1 or 2 of the Sherman Act. It held that neither the standards nor the testing and approval procedures constituted a boycott in *per se* violation of Section 1. Applying the rule of reason, the court concluded that the conduct challenged by petitioner, including the approval listing and seal, was in fact pro-competitive (7a-9a):

> . . . The District Court expressly found that NSF standards were developed to promote

uniformity in the health requirements that products are required to meet in different jurisdictions. This uniformity helps promote nationwide competition and enables manufacturers who elect to comply with NSF standards to be reasonably sure that they will not have to modify their product in order to meet the different requirements of many jurisdictions . . . Many states do not have adequate facilities to properly test whether or not a product complies with NSF health and safety standards. NSFTL's testing program helps to promote uniformity in the interpretation and application of the standards. The fixation of a seal of approval on the product or the listing of the product in a widely distributed publication only further assures the pro-competitive goal of nationwide acceptance of the product. These are all legitimate means of promoting NSFTL's testing service.

Other factors to be considered in analyzing the reasonableness of standard-making and testing programs lead us to the same result. The practice of treating NSFTL approval of a product as *prima facie* evidence of compliance with local standards avoids waste of time and money for duplicative testing in many different jurisdictions. NSF standards are periodically revised so that no product of adequate sanitary quality is excluded from qualifying for the seal of approval. NSF and NSFTL have never disparaged the quality of products which they have not tested. NSF and NSFTL are independent organizations and are not dominated or controlled by manufacturers of

> any one product. They are not in direct competition with the plaintiff and have no intent to exclude plaintiff from competition. We agree with the District Court's holding that no unreasonable restraint of trade was shown by the evidence.

With respect to petitioner's Section 2 claims, the court of appeals ruled (10a):

> We are unable to find any violation of § 2 of the Sherman Act. We are convinced NSF and NSFTL have not exercised monopoly power to exclude manufacturers from any relevant market; that the benevolent powers possessed by NSF and NSFTL are due to their non-partisan performance and the high reputation enjoyed by them and their individual members in the field of public health and sanitation including the objectivity of the test results.

## REASONS FOR DENYING THE WRIT

### I.

### THE HOLDING OF THE COURT OF APPEALS ON THE ISSUE OF SHERMAN ACT VIOLATIONS FOLLOWS THE CLEAR TEACHINGS OF THIS COURT, AND IS NOT IN CONFLICT WITH OTHER LOWER COURT DECISIONS.

This case presents no legal issue under the Sherman Act worthy of review. There is no conflict among the circuits or with the teachings of this Court with respect to the conclusion of both courts below that respondents' conduct is not *per se* illegal under §1 of the Sherman

Act. In claiming that the courts below have erred in their application of the rule of reason, petitioner is asking this Court, contrary to the two-court rule, to review the factual findings of the district court.

The NSF/NSFTL testing program and seal of approval do not fall within the activities which constitute concerted refusals to deal in *per se* violation of the Sherman Act. Exclusionary or coercive acts involving group boycotts, blacklists, or concerted refusal to deal are the keystones of *per se* illegality under the decisions of this court. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914). The district court found no evidence of any such exclusion, coercion, boycott, concerted refusal to deal, or anticompetitive intent.

The Sixth Circuit followed this Court's decision in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), holding that (6a):

> Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable.

The holding of the court of appeals and the district court's determination are wholly consistent with other decisions of this Court and the lower courts. Thus, the courts have consistently held that the group boycott *per*

*se* rule is limited to just those concerted activities which, lacking any redeeming economic or pro-competitive justification, are intended to eliminate competitors, inhibit their ability to compete or coerce their compliance with an anticompetitive course of dealing. Where such a purpose is lacking and the effect on competitors is therefore only indirect or ancillary to an otherwise lawful main purpose, the challenged conduct is measured by the rule of reason, not the *per se* rule.*

The finding of the district court, affirmed by the court of appeals, was that none of the respondents denied petitioner access to testing in a discriminatory fashion. The district court also found that (39a):

> [T]he record demonstrates that the primary purpose behind the NSF standards program has been pro-competitive in attempting to promote uniform standards among public health jurisdictions, thereby minimizing the number of differing, even conflicting, requirements,

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*Silver v. New York Stock Exch., 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Board of Trade of Chicago* v. *United States*, 246 U.S. 231 (1918); *Neeld* v. *Nat'l Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Hatley* v. *Am. Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977); *Worthen Bank and Trust Co.* v. *Nat'l Bankamericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Bridge Corp. of America* v. *Am. Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); *Roofire Alarm Co.* v. *Royal Indemnity Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963); *Cowen* v. *New York Stock Exch.*, 256 F. Supp. 462 (N.D.N.Y. 1966), *aff'd*, 371 F.2d 661 (2d Cir. 1967); *Deesen* v. *Professional Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

> reducing costs for all manufacturers, and increasing the number of manufacturers able to compete in each jurisdiction. . . .

Petitioner has failed to show any conflict as to the applicable legal standards. Petitioner has failed to prove conduct falling into long-accepted rules of *per se* illegality under Section 1. In the final analysis, petitioner is challenging only the factual findings of the district court.

Petitioner claims that even if the NSF seal and approval listing is not illegal *per se*, it is an unreasonable restraint of trade under the rule of reason. The lower federal courts have consistently held that a private standards program is not unreasonably restrictive where industry members were found not to be attempting to avoid competition from the plaintiff but were seeking to enhance their industry, where the standard embodied valid distinctions and criteria, where the plaintiff had an opportunity to be involved in the application of the standard, and where it was not applied to plaintiff in a discriminatory, arbitrary or capricious manner. *See: Structural Laminates, Inc.* v. *Douglas Fir Plywood Association*, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *Roofire Alarm Company* v. *Royal Indemnity Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).

In *Roofire Alarm*, involving a well-known seal of approval, the plaintiff alleged that Underwriters Laboratories had conspired with the defendant insurance company (which was an active participant in the Underwriters' program) to refuse to test plaintiff's device, thereby inhibiting its marketability. The district

court granted summary judgment to defendant on its denial that it conspired to foreclose plaintiff's device from the market, declaring:

> The action of Underwriters Laboratories Inc. appears to be for lawful and proper purposes. Even if the defendant participates with or through others in the setting of the standards adopted by Underwriters Laboratories, Inc., there is nothing to indicate that this has accomplished any unlawful or improper purpose. Rather, the defendant's connection with Underwriters Laboratories, Inc., and with other related organizations likewise appears to be for lawful and proper purposes. . . . An association formed to foster high standards, to mitigate evils in trade existing through lack of knowledge or information, and to encourage fair competitive opportunities is not to be condemned as an undue restraint of interstate commerce in violation of the Sherman Act merely because it may effect a change in market conditions.

202 F. Supp. at 169. The Sixth Circuit adopted the opinion of the district court in affirming.

Petitioner does not challenge the rule expressed in *Roofire*. It merely contests the district court's findings that the NSF seal and approval listing were not an unreasonable restraint of trade. Those findings, reviewed by the Sixth Circuit, need not again be reviewed and do not warrant granting the petition for a writ of certiorari.

## II.

## THE COURT OF APPEALS PROPERLY DECLINED TO REVIEW THE RECORD DE NOVO.

There is no rule or case authority which would require the court of appeals to review *de novo* the massive record developed in the trial court. District Judge Joiner reviewed the depositions of twenty-six witnesses as well as thousands of documents. Counsel argued the evidence and the law to the trial court for three days. There is no basis to depart from the "clearly erroneous" standard provided in Fed.R.Civ.P. 52(a) and applied here by the court of appeals.

The court of appeals held that its review of the facts *de novo* would invade the province of the trial court, citing Sixth Circuit cases for the proposition that, even where a paper record is involved, the standard of review is whether the findings of facts of the district court are supported by substantial evidence and are not clearly erroneous. Respondents know of no decision to the contrary.

The cases cited by petitioner as conflicting are not applicable. They invoke the appellate court's *right* to disregard findings where the credibility of a witness is not an issue. There is no obligation upon the appellate court to review the record *de novo*; in fact, the Sixth Circuit has followed the teaching of this Court in using the "clearly erroneous" standard in reviewing a paper record. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958;

*Commissioner* v. *Spermacet Whaling & Shipping Co.*, 281 F.2d 646 (6th Cir. 1960). There is neither precedent nor reason for this Court to impose a requirement of *de novo* review upon the courts of appeals.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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